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No. 13559

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALASKA STEAMSHIP COMPANY AND AMERICAN RADIO ASSOCIATION, C. I. O., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended,[1] for enforcement of its order issued against Alaska Steamship Company, herein called the Company, and America Radio Association, C. I. O., herein called the Union, on February 11, 1952, following the usual proceedings under Section 10 of the Act. This Court has jurisdiction of these proceedings under Section 10 (e) of the Act, the unfair labor practices

[1] 61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151 *et seq.* Relevant portions of the Act appear in the Appendix, *infra*, pp. 21–25.

having occurred within this judicial circuit at Seattle, Washington.[2] The Board's decision and order are reported at 98 N. L. R. B. 22 (R. 24–86, 97–105).[3]

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

The Board found that the Company violated Section 8 (a) (3) and (1) of the Act by denying employment to Horace Underwood because he resigned from membership in the Union, and that the Union violated section 8 (b) (1) (A) and (2) of the Act by causing the Company to do so. The discrimination occurred pursuant to a hiring arrangement which granted preference in hiring to members of the Union and which in practice denied job referrals to nonmembers by barring their names from the Union's assignment list. At the time in question the Company and the Union had no lawful union-security agreement as permitted by Section 8 (a) (3) of the Act.

The subsidiary facts, as found by the Board and as shown by the evidence, may be summarized as follows:

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[2] The Company, a Washington corporation with its principal office and place of business in Seattle, Washington, is engaged in the operation of ships for the transportation of persons and cargo between ports in the United States and ports in the Territory of Alaska. The Company concedes that it is engaged in commerce within the meaning of the Act; accordingly, no jurisdictional question is presented (R. 28; 9, 10, 18, 124, 125).

[3] The symbol "R." refers to the printed record. References preceding a semicolon are to the Board's findings. Those following are to the supporting evidence.

A. The hiring-hall arrangement between the Company and the Union

1. *The 1948 contract granting preference in hiring to Union members*

The Company is a member of the Pacific Maritime Association, known as PMA, and was a member of PMA's predecessor, Pacific American Ship Owners' Association, herein called PASA (R. 29; 19).

In December 1948, PASA and the Union executed a collective bargaining agreement (Gen. Counsel Exh. 3)[4] under which members of PASA, including the Company, agreed *inter alia* that the "offices of the [Union] shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made," and that "when filling vacancies preference of employment shall be given to members of the [Union]" (R. 29–31; 19, Gen. Counsel Exh. 3, p. 2).[5]

2. *The Union's practice of restricting job referrals to members only*

Early in 1949, the Union adopted certain shipping rules, which supplied detailed regulations and procedure for carrying out the broad preferential hiring

[4] By stipulation the parties agreed to dispense with the printing of exhibits, since in most instances the essential content of the more important exhibits is set forth in the Intermediate Report of the Trial Examiner (R. 291–292).

[5] The 1948 agreement remained in effect until July 1950, when it was replaced by a new agreement between PMA, PASA's successor, and the Union which, while retaining the hiring-hall provision, omitted the preferential hiring clause and provided that the Union would not discriminate against nonmembers in job referrals (R. 29; 19, Gen. Counsel Exh. 4, p. 4). The 1950 agreement is not involved herein, the unfair labor practices having occurred under the 1948 agreement. The Board dismissed the allegations of the complaint respecting the 1950 agreement (R. 41–47).

provisions of the 1948 agreement with respect to the assignment of radio officers to job vacancies (R. 31; Gen. Counsel Exh. 2). Under these rules the Union maintained a national assignment list which was compiled each week (R. 32; Gen. Counsel Exh. 2). The assignment list was open to members of the Union only (R. 32; 227–229, 243, 251–253).[6] To obtain a place on the list a member was required to file an application with the Union stating the port from which he wished to ship (R. 32; Gen. Counsel Exh. 2). If the application was accepted, the member would then be placed on the list and designated as "Active," namely, available for employment for the port specified (R. 32; 191–192, Gen. Counsel Exh. 2).

Job vacancies were filled from the list in accordance with the principles of rotary hiring, as follows: When a member company of PASA needed a radio officer, it would notify the local office of the Union that a job was available at a specified port (R. 32, 33; 187–189, 246, 255–258). The local office would then offer the job to the active member who had signed for that port and whose number was lowest in numerical order on the list (R. 33; Gen. Counsel Exh. 2). If the member accepted the job, he would be issued clearance by the Union (*ibid.*). Otherwise, the offer was repeated until the local office secured a member of the Union who would accept the job (*ibid.*). A vacancy could be filled from outside the

[6] The shipping rules were changed in June 1950, so as to allow nonmembers to obtain places on the assignment list (R. 37, 38; 182, 183, 227, 228). This was after the occurrence of the unfair labor practice here involved.

list only in the event that nobody on the list would accept the job (*ibid.*). There is no indication in the record, however, that such a contingency ever arose.

When a member of the Union obtained employment, his designation on the list would be changed from "Active" to "Employed" (*ibid.*). Thereafter, for each week of employment an employed member's number on the list was increased by 30, thereby causing him to move toward the bottom of the list (*ibid.*). Meanwhile, the unemployed or "Active" members were progressing toward the top of the list, taking the places formerly held by members who had secured employment (*ibid.*). When an employed member became unemployed, which ordinarily occurred when the ship to which he had been assigned was withdrawn from service for repairs or other reasons, he was required to register again with the Union for a place on the list (R. 48, 49; 142, 143, 246, 247). A registration continued in force until the unemployed member obtained employment (R. 174, 175, 247).

B. The denial of employment to Horace Underwood because of his resignation from the Union

1. Underwood joins the Union and is placed on the assignment list

On March 1, 1949, Horace Underwood, a qualified radio officer, joined the Union, and shortly thereafter was placed on the Union's assignment list as an "Active" member for the Port of Seattle, Washington, from which the Company operated its ships (R. 47; 109–113). On March 31, 1949, Underwood accepted referral to the *Coastal Rambler,* one of the Company's ships (R. 48; 112, 140–141, Union Exh. 5). He re-

mained so employed until early August 1949, when the *Coastal Rambler* was removed from service (*ibid.*). On August 10, 1949, Underwood registered for the list, and on September 14, was assigned to the *Palisana,* another of the Company's ships (R. 49–50; 113, Union Exh. 5). About November 23, 1949, the *Palisana* was withdrawn from service, and on December 1, 1949, Underwood again registered and was placed on the list (R. 50; 131, Union Exhs. 5 and 28, p. 13).

2. Underwood resigns from the Union and is taken off the assignment list

Underwood was opposed to the Union's system of rotary hiring because, as it worked out, the system prevented a radio officer from obtaining permanent employment with any one employer and Underwood was interested in employment with the Company only (R. 51, 52; 111–115, 148–153, Union Exh. 6). Underwood felt that he was entitled to seniority rights with the Company and that the rotary hiring system, depriving him of such rights, resulted in discrimination against him (R. 51, 52; 148–153, Union Exh. 6). Therefore, on December 20, 1949, Underwood resigned from the Union (R. 52, 53; 115–118, Union Exh. 6). Shortly thereafter the Union accordingly removed Underwood's name from the assignment list (R. 53; 179–182, 247, 248, 251–253).

After resigning from the Union, Underwood made repeated attempts to obtain employment directly with the Company (R. 54–57; 126–131, Gen. Counsel Exh. 8). The latter refused, however, to accept Under-

wood's application for employment on the ground that it hired through the Union only (R. 55; 126–131, 138, Gen. Counsel Exh. 9). On March 29, 1950, the Company wrote to the Union, asking it not to discriminate against Underwood and one Dallas Hughes in filling the Company's requests for radio officers (R. 55; Gen. Counsel Exh. 10). A week later the Company wrote the Union stating that Underwood had expressed the opinion to the Company that the Union would discriminate against him, and voicing the hope that the Union would not. On April 19, 1950, the Union replied that Underwood had been listed for employment and that there would be no discrimination against him (R. 55–57; 178). The Union did not in fact, however, restore Underwood's name to the assignment list so as to make him eligible for referral (R. 53, n. 11, 57; 115–119, 131–138).

3. *Underwood is denied referral to the Company's ship, the "Alaska"*

On the assignment list for January 7, 1950, the last upon which his name appeared, Underwood had a lower number than Lewis Deyo, a member of the Union, and was therefore entitled to referral ahead of him (R. 65, 66, n. 23 Union Exh. 28). Under the Union's shipping rules (*supra,* pp. 3–5), Underwood, had he remained on the list, would have continued to be numerically lower than Deyo until Underwood obtained employment (R. 65, 66; Gen. Counsel Exh. 2). In other words, as long as Underwood remained unemployed, Deyo could not have advanced beyond him on the list (*ibid.*).

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As of May 5, 1950, Underwood had not obtained employment with the Company (R. 56; 115, 138).[7] On that date a vacancy occurred in the position of second assistant radio operator aboard the *Alaska,* one of the Company's ships (R. 57, 58, 65; Union Exh. 27). This was a position which Underwood would have accepted if it had been offered to him (R. 67, 68; 147–149, 172, 173). Moreover, had his name not been removed from the assignment list, Underwood would have been entitled to the position ahead of Deyo because, as previously explained, he would have been numerically lower than Deyo on the assignment list. However, the position was filled by the Union's referral of Deyo (R. 65; Union Exh. 27).

II. The Board's conclusions of law

Upon the foregoing facts, the Board found that the provisions of the 1948 agreement, granting preference in hiring to members of the Union, were illegal since they went beyond the limited union-security conditions permitted by Section 8 (a) (3) of the Act (R. 63–73).[8] The Board found also that, pursuant to the preferential hiring provisions of the agreement,

[7] From the time of Underwood's resignation from the Union, until May 5, 1950, there were six vacancies on ships of the Company for which he was qualified. These vacancies were filled by referral of Union member radio officers who were numerically lower than Underwood on the assignment list for January 7 (R. 65; Union Exh. 27). These officers, of course, had remained on the list after Underwood's name had been removed.

[8] The Board referred to its earlier decision in *Pacific Maritime Association*, 89 N. L. R. B. 894, holding that the execution of the 1948 agreement had been violative of Section 8 (a) (1) because of the illegal preferential hiring provisions (R. 29, 34).

Underwood was denied employment with the Company because he had resigned from membership in the Union (R. 67). Accordingly, the Board concluded that the Company discriminated against Underwood in violation of Section 8 (a) (3) and (1) of the Act, and that by causing the Company to do so, through the illegal hiring agreement, the Union violated Section 8 (b) (2) and (1) (A) (R. 68). The Board concluded further that the removal of Underwood's name from the assignment list, in itself, constituted discrimination against Underwood, in violation of Section 8 (a) (1) and (3) by the Company, and Section 8 (b) (2) and (1) (A) by the Union (R. 99).

III. The Board's order

The Board's order (R. 100–105) requires the Company to cease and desist from encouraging membership in the Union by refusing to employ applicants because they are not members of the Union; or by otherwise discriminating against its employees for this reason, except to the extent authorized by Section 8 (a) (3) of the Act; and from in any like or related manner interfering with its employees in the exercise of their rights under the Act. Affirmatively, the Company is ordered to offer Underwood employment as a radio officer aboard the *Alaska,* or a substantially equivalent position, and to post appropriate notices.

In addition, the Board's order requires the Union to cease and desist from causing the Company to refuse to employ applicants because they are not members of the Union; from causing the Company to discriminate against its employees for this reason,

except to the extent authorized by Section 8 (a) (3) of the Act; and from in any like or related manner interfering with the Company's employees in the exercise of their rights under the Act. Affirmatively, the Union is ordered to restore Underwood's name to the assignment list and to refer him to assignments in accord with his proper place on the list.[9]

Finally, the Board's order requires both the Company and the Union jointly and severally, to make Underwood whole for any loss of wages he may have suffered by reason of the discrimination against him.

ARGUMENT

Substantial evidence on the whole record supports the Board's finding that the Company discriminated against Underwood because of his nonmembership in the Union, in violation of Section 8 (a) (3) and (1) of the Act, and that the Union caused the Company to do so, in violation of Section 8 (b) (2) and (1) (A)

A. The denial of employment to Underwood pursuant to the preferential hiring agreement between the Company and the Union, was unlawfully discriminatory

We believe that the whole record here affords ample support for the Board's findings against both the Company and the Union.

At the outset, the preferential hiring provisions of the 1948 agreement between PASA and the Union, to which the Company was a party, were unlawful on their face, as the Board found (R. 39–40). Providing that "when filling vacancies preference of employment

[9] The Board found (R. 41–47, 105) that the hiring arrangement between the Company and the Union pursuant to the new and revised contract of 1950, was not unlawful, since there was no preferential treatment of Union members or discrimination against nonmembers under the new contract (*supra*, p. 3, n. 5).

shall be given to members of the [Union]" (R. 30), the contract terms obviously fail to come within the exception to the statute's proscription of discrimination in regard to hire or tenure of employment because of union affiliation (Section 8 (a) (3) of the Act). The exception afforded by the proviso to Section 8 (a) (3) permits only a limited union-security agreement which may require membership in the contracting union 30 days after employment begins or 30 days after the effective date of the contract, whichever is later. The terms of the 1948 agreement, providing for preferential treatment of Union members at the initial hiring, were therefore unlawfully discriminatory.[10] Cf. *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 413–415 (C. A. 9); *N. L. R. B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d 516, 518 (C. A. 9); *N. L. R. B.* v. *United Hoisting Co., Inc.,* 198 F. 2d 465, 466 (C. A. 3), certiorari denied, 344 U. S. 914; *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686, 688–689 (C. A. 2), certiorari denied, 338 U. S. 954; *Red Star Express* v. *N. L. R. B.*, 196 F. 2d 78, 81 (C. A. 2).

[10] In the *Pacific Maritime* case, *supra*, the Board found it unnecessary to go beyond a determination that the substantive terms of the preferential hiring provision of the 1948 agreement were illegal (89 N. L. R. B. at 895). The Trial Examiner held, however, that the hiring agreement was unlawful for the further reason that no election authorizing a union-security agreement of any kind, as then required under Sections 8 (a) (3) (ii) and 9 (e) of the Act, had been held among employees of the company-members of PMA (*id.*, at 903–904). Cf. the *Katz* case, *supra*, 196 F. 2d at 415. The election requirement has since been removed by the amendments of 1951 (Pub. Law 189, 82nd Cong., 1st Sess., October 22, 1951).

Accordingly, when the Company and the Union proceeded to discriminate against Underwood pursuant to the hiring provisions of the 1948 agreement, they were not protected under the exceptions of Section 8 (a) (3) of the Act, but were accountable for their wrongful conduct. On the facts found by the Board, there is no question but that the Company discriminated against Underwood in violation of Section 8 (a) (3) and (1) and that the Union, by causing the Company to do so, violated Section 8 (b) (2) and (1) (A). *Katz* v. *N. L. R. B.,* 196 F. 2d 411 (C. A. 9); the *Local 743* case, *supra,* 202 F. 2d at 518; *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686, 689–690 (C. A. 2), certiorari denied, 338 U. S. 954; *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 527–528 (C. A. 7); *N. L. R. B.* v. *United Hoisting Co., Inc.,* 198 F. 2d 465, 466 (C. A. 3); cf. *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1013–1014, certiorari denied, 342 U. S. 815.

The facts with respect to the discrimination against Underwood need little elaboration. While Underwood belonged to the Union he was on the Union's assignment list and regularly obtained jobs with the Company through referral by the Union (*supra,* pp. 5–6). When he resigned from membership in the Union, however, his name was removed from the assignment list [11] and he was unable to obtain a job with the Company because of the operation of the preferential hiring agreement.

[11] Underwood sent his letter of resignation to the Union on December 28, 1949 (R. 52; Union Exh. 6). His resignation was accepted at a Union meeting some time in January 1950, and after his appearance on the assignment list for January 7, his name was removed and did not appear on any subsequent list (*supra*, p. 6).

Thus, in response to his direct application for employment in March 1950, the Company wrote Underwood on March 29 that it could not hire him because it did its hiring exclusively through the Union (R. 54–55; Gen. Counsel Exh. 9). And although the Company relayed to the Union Underwood's expressed fear that the Union would discriminate against him with respect to job referral, and requested the Union not to do so (*supra,* pp. 6–7), the fact remains that that is exactly what the Union did do. For despite the Union's assurance to the Company that it would restore Underwood's name to the assignment list and would not discriminate against him (*supra,* p. 7), the Union on May 5, acting directly to the contrary, referred Deyo to the Company for the job on the *Alaska,* to which Underwood was entitled (*supra,* pp. 7–8).

It is clear that Underwood would have been given the job but for the illegal preferential hiring agreement. The Company, which had employed him in the past, demonstrated its desire to do so again when it told him in its March 29 letter that it could not accept his direct application because of its hiring arrangement with the Union, but that he should register again with the Union, and that "we have requested that you be dispatched to us without discrimination" (R. 55–56; Gen. Counsel Exh. 9).

It is equally clear that Underwood would have obtained the *Alaska* job on May 5 if the hiring agreement, contrary to its express terms, had been administered on a nondiscriminatory basis; that is, if Underwood's name had been kept on the list despite his resignation from membership in the Union. As we

have seen (*supra,* pp. 7–8), on the assignment list for January 7, the last on which his name appeared, Underwood had a lower number than Deyo and was thus entitled to referral ahead of him. And the rotation system under which the assignment list operated made it impossible for Deyo to pass Underwood on the list as long as Underwood remained unemployed (*supra,* pp. 3–5). Therefore, if the Union had retained his name on the list from January 7 until May 5, during all of which period Underwood was not employed, he would have remained ahead of Deyo on May 5 and would have been referred to the *Alaska* job ahead of Deyo.[12]

Manifestly the Union's contention, that Underwood's resignation from membership was not the real reason for the removal of his name from the assignment list, is without merit, as the Board found (R. 53–54, n. 14). The Union's position is that it understood that Underwood desired his name removed from the list because he preferred to seek employment through other channels. But on the facts of the case this is, at best, a disingenuous claim.

In the first place, the whole point of the hiring agreement between the Company and the Union was to give preference in hiring to Union members. And the Union's shipping rules provided for the listing

[12] The Board properly rejected the claim that Deyo was ahead of Underwood on the January 7 list, which was not introduced in evidence (R. 66–67, n. 23). The list for the preceding week, December 31, 1949, which is in evidence, shows Underwood as number 828 and Deyo as number 845 (R. 66–67, n. 23, 230; Union Exh. 28, pp. 1, 13). As we have already seen, since Underwood was unemployed during this time Deyo could not possibly have gone ahead of him on the list at any time between December 31 and May 5.

of members only (*supra,* p. 4). In the second place, Underwood's letter of resignation made it clear that what he really wanted was to be able to work for the Company on the basis of his own merit as a radio officer, and to be entirely free of the Union.[13] And in

[13] Underwood's letter of resignation read as follows (R. 52–53; Union Exh. 6):

Dec. 28, 1949
Vashon, Wash.

"American Radio Ass'n"
Mr. Ralph Miller, (Seattle)
Mr. Phil O'Rourke, (S. F.)
Mr. Steinberg, (N Y K)
Gentlemen:

We are again approaching that time of the year, when new years resolutions, are in order.

My resolution—To make every effort in 1950 to rescue my family and myself from slowly encircling poverty and bankruptcy brought on by my poor luck with the "ARA" employment Roulette Wheel and certain "ARA" bylaws which infringe on my Constitutional Rights as a American citizen. To fight with all my ability the unamerican efforts of all enemies of individual freedom.

To help form a new Union of my brother workers (independent if necessary) and based on a mans rights and abilities and not on a system that automatically reduces the status of the best and most concientious worker to that of the lease efficient and undependable.

To fight a system, that professes to be conducting a campaign against communism, and other isms, but will tolerate a set of bylaws that foster, the eventual complete elimination of the freedom of the individual and the utter disregard of earned and proven seniority rights.

To make a long story short

"GENTLEMEN"
I RESIGN FROM "ARA"

Isn't it kinda foolish to work hard and pay out a lot of hard earned money in dues for the privilege of bankrupting myself?

And now Gentlemen, the time has come for you to call your meetings to order and tell them what a skunk I am for my actions—but I feel quite sure, that if there is still *even* a *small*

the absence of a valid union-security agreement between the Company and the Union, this is precisely what he had a right to do under the Act. The *Katz* case, *supra,* 196 F. 2d at 414; the *United Hoisting* case, *supra,* 198 F. 2d at 467.

But neither the Union nor the Company would permit Underwood to follow the course he desired. The Union, as we have seen, foreclosed him by removing his name from the assignment list and refusing to refer him to the Company for a job. And the Company accomplished the same end by telling him that it could not deal with him directly but could hire him only through the Union. To argue, in the face of this situation, that Underwood was denied a place on the Union's assignment list and a job with the Company for a reason other than the fact that, by resigning from the Union, he asserted his legal right to be free of the Union in the matter of obtaining employment with the Company, is simply to deny the plain facts.

Nor can the Company absolve itself of responsibility by pointing to the fact that, prior to May 5, it had requested the Union to waive the illegal union-preference feature of the hiring agreement with respect to Underwood (R. 65–66). The Company's letter to the Union on March 29, asking it to dispatch Underwood for employment "without discrimination as to union or nonunion affiliation or other discrimination whatsoever, anything in our collective bargain-

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spark of the spirit of the founders of this country, in your soul—you will understand my decision.

(Signed) H. W. Underwood
Vashon, Wash.

ing agreement to the contrary notwithstanding" (R. 67–68, n. 24; Gen. Counsel Exh. 10), was not a repudiation of its illegal hiring agreement with the Union. It was nothing more than a request that the Union make an exception of Underwood, and forego the agreement insofar as his employment was concerned. And when the Union ignored its request, the Company's gesture became totally ineffective, both as an aid to Underwood and as an excuse for the Company. For the fact remains that the Union, despite the Company's request, adhered to the preferential hiring agreement and did discriminate against Underwood by referring Deyo, a Union member on the assignment list, to the *Alaska* job, to which Underwood was entitled except for the fact that he had resigned from the Union and, accordingly, had been dropped from the assignment list. It is taking no liberties with the aim of the statute to say that, as long as the illegal union-preference hiring agreement remained outstanding, the Company was responsible for any illegal discrimination which occurred pursuant to the administration of its express terms. Cf. *N. L. R. B.* v. *A. B. Swinerton et al.*, 202 F. 2d 511, 514–515 (C. A. 9); the *Local 743* case, *supra*, 202 F. 2d at 518.

Similarly, the Company's claim that it did not know of Underwood's resignation from the Union, or that Union membership or nonmembership played any part in Underwood's opposition to the Company's hiring system (R. 67, n. 24), is of no avail. As the Trial Examiner observed (*ibid.*), the amended charge which was served upon the Company on March 21,

1950, alleged that the Company refused to employ Underwood "to encourage membership in" the Union, in violation of Section 8 (a) (3) of the Act (R. 4). And the Company forthwith wrote the Union on March 29, asking it to dispatch Underwood for employment "without discrimination as to union or nonunion affiliation" (R. 67–68, n. 24). Upon these facts the Company cannot seriously contend that, prior to May 5, it was not aware of Underwood's claim that he was being discriminated against because of his nonunion status.

In any event, as already suggested, the Company was responsible for the discrimination against Underwood, without regard to the matter of its knowledge as to the details of Underwood's particular case. The Company, having entered into, and continuing to maintain, a hiring agreement the stated purpose of which was to give illegal preference to Union members, and conversely to discriminate illegally against nonmembers, is in no position to assert that in a particular case it did not *know* that the discriminatory purpose of its agreement was being carried out.

Under the Company's view, the maintenance of an unlawful preferential hiring agreement would stand for nothing. For, despite the discriminatory intent expressed in such an agreement, the employer would never be responsible for any acts of discrimination thereunder, unless in each instance his discriminatory intent were proved anew. The Company's position, we submit, is entirely untenable.

B. The removal of Underwood's name from the Union assignment list was also unlawfully discriminatory

The Board properly found (R. 99) that "the act of removing Underwood's name from the assignment list in itself constituted discrimination in violation of Section 8 (a) (1) and (3) of the Act by the Respondent Employer and Section 8 (b) (1) (A) and (2) of the Act by the Respondent Union."

We have already seen that the preferential hiring agreement was unlawful because it operated to discriminate in favor of Union members and against nonmembers. And in conjunction with the hiring agreement the Union maintained exclusively for Union members the assignment list from which it selected radio officers for referral for available jobs. Since it was impossible, as was demonstrated in Underwood's case, for a man to obtain a job with the Company without referral by the Union, removal of a man's name from the assignment list was the equivalent of removing him from any opportunity for a job. Therefore, where such removal was effected, as in Underwood's case, because of the radio officer's lack of membership in the Union, it constituted proscribed discrimination with respect to terms and conditions of employment, under Section 8 (a) (3) and (1) of the Act.

Although the Union, rather than the Company, actually removed Underwood's name from the list, the Company is still accountable for the loss of opportunity for employment which the removal of his name automatically entailed. The discrimination thus prac-

ticed against Underwood, like the discrimination of May 5, was the direct result of the Company's unlawful hiring arrangement with the Union. Similarly, the Union's participation in the unlawful hiring agreement, pursuant to the terms of which the Union removed Underwood's name from the assignment list, renders the Union responsible for having caused the Company to discriminate against Underwood, in violation of Section 8 (b) (2) and (1) (A) of the Act.

CONCLUSION

For the reasons stated, it is respectfuly submitted that a decree should issue enforcing the Board's order in full.

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MAY 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice),

to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (*ii*) *if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.*[1]

* * * * *

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discrimi-

[1] The italicized portion has been eliminated by amendment since these proceedings were instituted, see pp. 24–25, *infra.*

nate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;

* * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall

certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

SEC. 18.[2] * * *

* * * * *

SEC. 18. (b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding

[2] Section 18 was created by Public Law 189, 82d Cong., 1st sess., enacted October 22, 1951.

12 months received from the Board a notice of compliance with section 3 (f), (g), and (h) and (ii) unless following an election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:''

U. S. GOVERNMENT PRINTING OFFICE: 1953

No. 13559

In the United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

ALASKA STEAMSHIP COMPANY and AMERICAN RADIO ASSOCIATION, CIO, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT ALASKA STEAMSHIP COMPANY

BOGLE, BOGLE & GATES
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On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR RESPONDENT ALASKA STEAMSHIP COMPANY

JURISDICTIONAL STATEMENT

This case is before the Court on petition of the National Labor Relations Board, herein called the Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), herein called the Act, for enforcement of its order issued on February 11, 1952, against Alaska Steamship Company, herein called the Company, and American Radio Association, CIO, herein called the Union. This Court has jurisdiction of these proceedings under Section 10(e) of the Act (29 U.S.C.A. §160(e)). The Board's Decision and Order (R. 97-105, 24-87) are reported at 98 NLRB 22. Pertinent portions of the Act are set forth in Appendix A hereto. Where references to sections are made herein, such references are to sections of the Act unless otherwise specified.

STATEMENT OF FACTS

A. The Business of the Company.

The Company is a corporation organized and existing under the laws of the State of Washington and has its principal office and place of business in Seattle, Washington. It is engaged primarily in the operation of ocean-going vessels for the transportation of passengers and cargo between ports in the United States and ports in the Territory of Alaska (R. 9-10, 18, 125).

B. Statement of the Pleadings.

This case arose upon original charges of unfair labor practices filed by Horace W. Underwood, a marine radio operator, against the Company and the Union on January 17, 1950 (R. 3, 5, Gen. Counsel Exh. 1). Amended charges were filed against the Company on March 20, 1950, and against the Union on January 22, 1951 (R. 3, 5, Gen. Counsel Exh. 1). On January 22, 1951, the Regional Director, 19th Region of the Board, issued a consolidated complaint against the Company and the Union. In substance the complaint alleged: (1) that the Company and the Union on December 3, 1948, entered into a collective bargaining agreement, later amended by agreement of July 14, 1950, which agreement and amended agreement provided that the Company would secure radio operators for its vessels from offices of the Union and containing preferential hiring provisions allegedly unlawful because beyond the permissible limits prescribed in Section 8(a)(3); (2) that the Union had in effect following May 15, 1949, shipping rules, and assignment lists administered by the Union pursuant thereto, according to which the Union

allegedly restricted to Union members referrals to positions as radio operators with the Company and other employers; and (3) that the Company, by acquiescing in and consenting to the practice of obtaining radio operators from the Union, whereby the Union allegedly refused to dispatch Underwood to employment as a radio operator with the Company or any other employer following December 1, 1949, engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3), and that the Union engaged in unfair labor practices within the meaning of Sections 8(b)(2) and (1)(A) (R. 9-18).

Answer to the consolidated complaint was duly filed by the Company in which it admitted facts relating to the business of the Company but denied in all respects that it had engaged in unfair labor practices (R. 18-21). The Union likewise filed answer in which it denied that it had engaged in unfair labor practices (R. 21-2).

Following hearing and taking of testimony, the Trial Examiner on July 3, 1951, issued his intermediate report and recommended order (R. 24-87). Both the Company and the Union duly filed exceptions to the intermediate report and recommended order (R. 87-91, 92-7).

On February 11, 1952, the Board issued its Decision and Order (R. 97-105). The Board filed petition for enforcement of its order in this Court (R. 265-7) to which petition the Company and the Union each duly filed answers (R. 270-7, 278-90).

A stipulation has been entered into whereby the parties agreed that none of the exhibits which have been introduced by any of the parties need be printed and that

this Court may use and consider the original exhibits which are on file in the case (R. 291-2).

C. The Agreements Involved.

In 1948 the Company was a member of Pacific American Shipowners Association, herein called PASA. On behalf of the Company and other employers, PASA entered into a collective bargaining agreement dated December 3, 1948, herein called 1948 agreement, with the Union (Gen. Counsel Exh. 3). The 1948 agreement provided in part as follows (Gen. Counsel Exh. 3, p. 2):

> "PREFERENCE OF EMPLOYMENT
>
> "Section 1. Employers agree to recognize the Association as the authorized collective bargaining agent for all Radio Officers employed by the Employers and when filling vacancies preference of employment shall be given to members of the Association.
>
> "HIRING
>
> "Section 2. The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made. For the purpose of promoting safety of life and property at sea, and to guarantee as far as is practical equal distribution of work among all members of the Association, the parties hereto agree that vacancies shall be filled in the following manner. Preference shall be given the Radio Officer longest unemployed who can present proof of previous employment and/or experience on a job or jobs similar to that

which is offered, and who in the judgment of the Employer is qualified, competent, and satisfactory to fill the job.

"When any Radio Officer is rejected, the Employers shall furnish a statement in writing to the Association stating specifically the reason why he is not qualified, competent, or satisfactory to fill the job. * * * "

During 1949 PASA was succeeded by the Pacific Maritime Association, herein called PMA, a newly-formed Coast Association of employers.

In a case unrelated to the present proceeding, and designated *Pacific Maritime Association,* Case No. 20-CA-166, the Board previously considered the validity of the hiring provisions of the 1948 agreement. 89 NLRB 894. The Board in that decision found and concluded that the mere execution of the 1948 agreement, which contained unlawful preferential hiring provisions, violated Section 8(a)(1). The Board ordered that PMA (as successor to PASA) cease giving effect to the 1948 agreement. The decision in Case No. 20-CA-166 was rendered by the Board on April 28, 1950. Following that decision and pursuant to the Board's order entered therein, PMA and the Union negotiated a new agreement dated July 14, 1950, herein called the 1950 agreement, and made effective April 28, 1950 (Gen. Counsel Exh. 4). The 1950 agreement contained no provision giving preference of employment to members of the Union (Gen. Counsel Exh. 4, p. 2).

Although counsel for the General Counsel alleged in this case that the 1950 agreement contained unlawful preferential hiring provisions, the Trial Examiner rec-

ommended dismissal of, and the Board dismissed, all allegations relating to the invalidity of the 1950 agreement (R. 41-2). The Trial Examiner also recommended dismissal of, and the Board dismissed, all allegations to the effect that any discrimination occurred in the administration of the 1950 agreement (R. 42-7).

Furthermore, because the validity of the hiring provisions contained in the 1948 agreement (Gen. Counsel Exh. 3) had already been litigated in Case No. 20-CA-166 that issue was not relitigated in this case (R. 39-40).

In its present posture, this case does not present any issues with respect to the validity of the 1948 or 1950 agreements. The only issues here involved relate to alleged discrimination against Horace W. Underwood.

D. Facts Relating to Horace W. Underwood.

The Company has utilized the employment offices of the Union, or its predecessors, for securing sea-going radio operator personnel since 1935. The Company maintains no facilities for hiring such personnel directly. The practice in the industry has likewise been to secure other categories of sea-going employees through the employment offices of the collective bargaining agent representing employees in the particular classification involved (R. 256-7).

Underwood was continuously employed as radio operator by the Company on the Coastal Rambler commencing April 2, 1949, and terminating on or about August 6, 1949 (R. 110-13, 140-2). This was a permanent job (R. 142-3, 154, 166, 170, Union Exh. 5). At that time Underwood was a member of the Union (R. 110,

Union Exh. 6), and was dispatched to the vessel by the Union (R. 142). On or about August 6, 1949, the COASTAL RAMLER laid up, became inactive, and the entire crew paid off, including Underwood (R. 141). At that time, under rules uniformly applied in the operation of the Union's rotary hiring system, Underwood had a recognized union right to "stand by" his job on the COASTAL RAMBLER and sail with the vessel at such time as she resumed active operation (R. 142-3, 167-8). However, Underwood decided to draw unemployment compensation; under applicable rules and regulations of the State Unemployment Compensation Department, Underwood could not "stand by" his job and draw unemployment compensation because he would not be actively seeking employment (R. 137, 142-3, 150, 164-5, 168). Underwood decided to draw unemployment compensation and relinquish his union right to "stand by" the job on the COASTAL RAMBLER (R. 143, 167). He was then placed on the "active" list at the employment offices of the Union for subsequent dispatch in normal course under the rotary hiring system (R. 144, 166-9, Union Exh. 5).

On or about September 11, 1949, Underwood was offered and accepted through the rotary hiring system, a "relief" job on the PALISANA (R. 113-14, 145-6, 159-60, 233, Union Exh. 5), which he retained until November 22, 1949 (R. 114, 146). At that time the vessel laid up and the crew paid off, including Underwood (R. 145, Union Exh. 5). The termination of this relief job again had the effect of putting Underwood back on the Union's "active" list in a lower position, since under the principles of rotary hiring "employed" radio operators

dropped 30 places per week on the Union's assignment list during their period of employment, whether employed on a relief or permanent job (R. 114-15, 118, 139-40, 192-3).

At the time his relief job terminated on the PALISANA on October 21, 1949, Underwood testified that under *old* shipping rules of the Union, no longer then in effect, he would have been entitled to keep the job on the PALISANA as a permanent one when the vessel next sailed (R. 113). The evidence clearly shows, however, that under the shipping rules then applicable the "relief" job terminated and the position on the PALISANA was properly offered to the man or men next on the assignment list in normal course of dispatch (R. 114-5, 176-7).

Underwood was then placed on the Union's active list, under the rotary hiring system, on December 1, 1949 (R. 131, Union Exh. 5). During all of this period just discussed, Underwood was a member of the Union (R. 110, Union Exh. 6) and had been dispatched to vessels operated by the Company through the employment offices of the Union (R. 142), Union Exh. 5).

The foregoing background evidence is highly significant because it pointedly demonstrates the basis for certain prejudices entertained by Underwood and is the starting point for his subsequent conduct and position in this case. An understanding of this background is pertinent in appraising the conduct of the Company and the obligations under the Act of both the Company and Union with respect to Underwood.

Underwood had, for some years past, and at the per-

tinent times material to this case, wanted to work only in a permanent job and only on vessels operated by the Company, and he consistently refused job opportunities on other runs for other companies (R. 115-18, 138-9, 147-9, 155-7, 172-3). Because of his desires in this respect, Underwood believed that the rotary hiring system operated unfairly as to him because he was only seeking permanent jobs with the Company, pursuant to his own desires, whereas other radio operators were seeking all job opportunities with all companies under the rotary hiring system (R. 149, 153). Underwood described this condition as "discrimination" against him but obviously it has nothing to do with "discrimination" as defined in Section 8(a)(3) since no element of union or non-union affiliation enters the picture at all. Underwood described this condition as a "roulette wheel" (R. 163-4). Underwood has used the word "discriminated" in a broad sense and apart from its specific designation under the Act.

Because of his belief that the rotary hiring system operated unfairly against him, Underwood "got mad" at the Union and resigned from the Union by writing a letter of resignation dated December 28, 1949 (R. 113, 115, Union Exh. 6). His testimony and the letter of resignation establish that his reason for resigning was *his opposition to the rotary hiring system,* not because of any union or nonunion aspects thereof, but solely because of his belief that the system operated unfairly as to him in obtaining permanent jobs with the Company (R. 114-5, 149, Union Exh. 6).

The Union interpreted Underwood's letter of resig-

nation to mean that he no longer wished to ship through or utilize the employment offices of the Union for obtaining dispatch to jobs (R. 181, 254). Underwood's name did not appear on the Union's national assignment list in the week following January 7, 1950 (R. 230, 251). The resignation of Underwood from the Union and the subsequent omission by the Union in the week following January 7, 1950, of Underwood's name from the Union's national assignment list, were events which were never called to the attention of the Company.

Immediately prior to his resignation from the Union, Underwood attempted to secure employment in preference to those on the Union's rotary hiring list by applying directly to the Company for a position as marine radio operator (R. 126-9, Gen. Counsel Exh. 8). Following his resignation from the Union, Underwood likewise expressed interest, in numerous letters which he wrote to the Company during the period from March 3, 1950, to May 25, 1950, in obtaining employment directly from the Company without reference to the rotary hiring system (R. 160-1). In these letters no mention was made by Underwood of his union or non-union status; Underwood simply expressed a continuing interest in obtaining employment with the Company, expressed *his opposition to the rotational hiring system of assignment of radio operators,* and his thoughts about a system of hiring based upon seniority *with one company,* which in Underwood's judgment would have afforded him a better chance of employment by the Company (R. 160).

In response to some of Underwood's letters received

in March, 1950, and to his application for employment theretofore filed with the Company, the Company wrote to Underwood on March 29, 1950, advising him as follows (Gen. Counsel Exh. 9):

> "Reference is made to application for employment heretofore filed with us. We are unable to give consideration to applications for employment made to us by mail. We make use of the employment facilities of the office maintained by the American Radio Association, CIO, at 3138-3139 Arcade Building, Seattle, Washington.
>
> "You are requested to register with that office and we have requested that you be dispatched to us without discrimination. A copy of our letter of even date to the American Radio Association, CIO, is enclosed. If after so registering you consider that any discrimination has been practiced against you, kindly advise us in writing."

On the same date, March 29, 1950, the Company wrote a letter to the Union's Seattle branch office, a copy of which was forwarded to Underwood, in which the Company advised the Union as follows (Gen. Counsel Exh. 10):

> "The following have made written application for employment with us as radio officers:
>
> | *Name* | *Date* |
> |---|---|
> | Horace Watson Underwood | December 29, 1949 |
> | Dallas Hughes | December 12, 1949 |
>
> "We request that when radio officers are ordered from your office that these applicants, upon registering with you, be dispatched without discrimination as to union or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwith-

standing. It is also requested that their registration with you be deemed effective from the date of the application filed with us. We, of course, reserve the right to reject for sufficient cause any person dispatched to us.

"We enclose copy of form of letter being mailed to both of the applicants."

Underwood received the letter from the Company (Gen. Counsel Exh. 9) together with a copy of the letter to the Union (Gen. Counsel Exh. 10) on March 31, 1950; after receiving the letter he proceeded on the Monday following receipt of the letter (April 3, 1950) to the employment offices of the Union, requested to be dispatched, and he subsequently advised the Company of his action in this respect (R. 146-7, 174).

On April 12, 1950, the Company wrote to the Union at its Seattle office enclosing a letter of April 3, 1950, written to the Company by Underwood in which, according to the Company's April 12, 1950, letter to the Union, Underwood expressed the opinion that the Union would discriminate against him. The letter of April 12 from the Company to the Union, concluded with the expression that the Company trusted that there would be no discrimination against Underwood or Hughes. On April 19 there was a response by Ralph Miller, then Port Agent for the Union, to the Company's letter in which Miller *stated that Underwood and Hughes had been listed for employment, and that there would be no discrimination against them* (R. 178). Subsequent to this exchange of correspondence Underwood did not advise the Company of any alleged instances of discrimination against him in the normal channel of em-

ployment—the hiring offices of the Union—and the evidence establishes that in fact there were none.

Even Underwood himself did not deny that the shipping rules were at all times applied as equally to him as to members of the Union. The undisputed testimony of Mr. Lundquist, Port Agent for the Union following Miller, establishes that between December 1, 1949, and June 1, 1950, radio operators, both union and non-union, were dispatched indiscriminately to employment if they filed applications (R. 255, 220). The employment opportunities of the Union were made equally available to union and non-union members between December 1, 1949, and July 1, 1950 (R. 255).

At all times subsequent to April 3, 1950, Underwood received equal treatment in the normal channel of employment, the employment offices of the Union. He was offered at least three jobs by Miller, then Port Agent for the Union (R. 116-7, 132-3, 138-9), all of which Underwood refused. During the summer Miller attempted to contact Underwood and found that he was employed in Alaska (R. 254). Underwood left for a job in an Alaska cannery on July 23, 1950. (R. 134). Following his return from Alaska, Underwood contacted Lundquist, who had replaced Miller as Port Agent for the Union in September, 1950, on or about October 9, 1950, and advised Lundquist that he was again available for employment only in certain limited categories of jobs —permanent assignments to vessels of the Company engaged in short runs (R. 194). Underwood was offered several jobs between October 9, 1950, and February 27, 1951, all of which he refused (R. 155-7, 239-42).

On the latter date Underwood was offered and accepted a permanent job on the PACIFICUS, a vessel operated by Coastwise Line in the Alaska trade (R. 171, 241).

Underwood himself testified that, according to his own best judgment and based upon his position on the "active" Union assignment list when he terminated on the PALISANA in November, 1949, "without the Korean war I would not have been employed on the Alaska ships until the spring of 1951" (R. 114-5, 175-6). This was confirmed by Lundquist and was due to a general slump in shipping and unemployment conditions in the industry (R. 186-7, 228-9). That Underwood would not have received assignment to Alaska vessels of the Company between December, 1949, and November 8, 1950, even with the intervening Korean war, is clearly established by the chronological history of jobs filled on vessels of the Company during that period (Union Exh. 27, R. 230-9). Even had he remained a member of the Union during that entire period, Underwood would not, under the normal operation of the Union's rotary hiring system, have been referred to any permanent job on vessels of the Company between December, 1949, and November 8, 1950. This period includes the date of May 5, 1950, on which one Lewis Deyo was dispatched by the Union to the Company's vessel ALASKA as second assistant radio operator.

THE CONCLUSIONS OF THE BOARD

The Board concluded that preference of employment to members of the Union resulted in an unlawful denial of employment to Underwood on May 5, 1950, when Lewis Deyo rather than Underwood, was referred by the Union to the position of second assistant radio operator on the Company's vessel ALASKA; that the Company therefore discriminated against Underwood in violation of Section 8(a)(3) and (1); and that, by causing the Company to do so, the Union violated Sections 8(b)(2) and (1)(A) (R. 99, 65-8). In this respect the Board agreed with the conclusions of the Trial Examiner.

The Board also concluded that the act of removing Underwood's name from the Union assignment list itself constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company, and Sections 8(b)(1)(A) and (2) by the Union (R. 99). In this respect, the Board went beyond the findings and conclusions of the Trial Examiner.

THE ORDER OF THE BOARD

The Board's order (R. 100-105) directs the Company, its officers, agents, successors and assigns to cease and desist from (1) encouraging membership in the Union, or in any other labor organization, by refusing to employ applicants for employment because they are not members of the Union, and discriminating against any employees for this reason except to the extent authorized by Section 8(a)(3); and (2) in any like or related manner interfering with, restraining or coerc-

ing its employees in the exercise of rights protected by the Act.

The Board's order directs the Company to take the following affirmative action which the Board found will effectuate the purposes of the Act: (1) offer Underwood employment as a radio operator on its vessel ALASKA, or in a substantially equivalent position; and (2) post certain notices in its offices.

The Board's order directs the Union to cease and desist from (1) causing the Company to refuse to employ applicants for employment because they are not members of the Union; and (2) in any like or related manner restraining or coercing employees of the Company in the exercise of rights guaranteed by the Act.

The Board's order likewise directs the Union to take the following affirmative action which the Board found would effectuate the purposes of the Act: (1) On proper application and request, restore Underwood's name to its assignment list and refer him to assignments without discrimination; and (2) post certain notices in its offices.

The Board's order affirmatively directs that the Company and the Union, jointly and severally, make whole Underwood for any loss of pay he may have suffered by virtue of the alleged discrimination against him.

SPECIFICATION OF ERRORS RELIED UPON

It is the position of the Company that the following findings and conclusions of the Board, and all subsidiary findings and conclusions related thereto upon which such findings and conclusions are based, are not supported by substantial evidence on the record considered as a whole, are not supported by the findings, are contrary to law, and for that reason the portions of the Board's order predicated thereon are improper, are contrary to law, and are beyond the powers of the Board:

1. That the Company discriminated against Underwood in violation of Sections 8(a)(3) and (1) of the Act, and that by causing the Company to do so, the Union violated Sections 8(b)(2) and (1)(A).

2. That the failure to offer Underwood the assignment as second assistant radio operator on the ALASKA on May 5, 1950, filled by Lewis Deyo, was discriminatory within the meaning of the Act.

3. That on May 5, 1950, Underwood was unlawfully denied employment.

4. That the act of removing Underwood's name from the national assignment lists of the Union constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company and Sections 8(b)(1)(A) and (2) by the Union.

5. That the Company had knowledge of Underwood's union or non-union status at any time material to this case.

6. That Underwood would have chosen to stand by the ALASKA following October 14, 1950.

It is the further position of the Company that the Board's order in its entirety is improper as against the Company and especially in the following particulars, to-wit:

1. In ordering that the Company offer any employment whatsoever to Underwood.

2. In ordering that the Company and the Union, jointly and severally, or in any manner, make whole in any manner Underwood for any alleged loss of pay whatsoever.

3. In ordering that the Company and the Union cease and desist from engaging in certain acts or alleged unlawful practices, or from interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act.

Without prejudice to its position elsewhere asserted herein, it is the further position of the Company that the Board erred in the following particulars, to-wit:

1. In failing and refusing to find that the Union was solely responsible for the discrimination, if any, suffered by Underwood and in failing to order that the Union only should be required to make whole Underwood for loss of pay, if any, sustained by Underwood as a result of discrimination, if any.

2. In failing and refusing to find and affirmatively order that Underwood should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a willful incurrence of wage losses.

3. In failing and refusing to find and affirmatively order that any award of back pay in favor of Underwood should terminate not later than October 14, 1950.

ARGUMENT

Summary of Argument

Substantial evidence on the record considered as a whole does not support the findings and conclusions of the Board that Underwood was discriminated against by the Company in violation of Sections 8(a)(3) and (1), or that the Union caused the Company to so discriminate in violation of Sections 8(b)(2) and (1)(A).

The evidence does not support a finding that Underwood was discriminatorily refused employment by the Union's referral of Lewis Deyo to the Company's vessel ALASKA on May 5, 1950. The record is barren of evidence that Underwood rather than Deyo was entitled to or would have received the assignment, or that the referral of Deyo to the ALASKA by the Union was for any reason proscribed by the Act.

The removal by the Union of Underwood's name from the Union assignment lists in the week following January 7, 1950, did not constitute discrimination by the Company against Underwood. The act of removing Underwood's name was the act of the Union in which the Company did not participate, of which the Company had no knowledge, and for which the Company cannot be found responsible under any interpretation of the Act.

Even assuming *arguendo* that Underwood was discriminated against, the Board order is improper and invalid in the following respects, to-wit: (1) in failing to order that the Union only should pay back pay, if any; (2) in failing to order affirmatively that Underwood should not be offered employment or back pay

because he engaged in willful incurrence of wage losses; and (3) in failing to order that back pay, if any, in favor of Underwood should terminate not later than October 14, 1950.

I. The Company did not discriminate against Underwood in violation of Sections 8(a)(3) and (1), and the Union did not cause the Company to so discriminate in violation of Sections 8(b)(2) and (1)(A).

Section 8(a)(3) declares it to be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." Aside from proscribing discrimination based upon union considerations, the Act was not designed to prescribe the form or method in which an employer shall recruit and hire employees. The Act does not, nor was it intended to, dictate to an employer that he shall or shall not utilize any particular method or channel for hiring employees. *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 186-7; *Jones & Laughlin Steel Corp. v. N.L.R.B.,* 301 U.S. 1, 45.

Basically, Underwood is opposed *only* to rotary hiring based upon *job availability in the industry* and would prefer a system based upon job availability and seniority *with one company.* This has not been the practice in the maritime industry or with the Company. It is perhaps unfortunate that Underwood entertains these views. But his position and views would be precisely the same under a rotary hiring system operated by employers on an industry-wide basis without the Union in the picture at all.

By his resignation from the Union in December, 1950, and his subsequent applications direct to the Company, Underwood sought preferential status of employment with the Company apart from and by going outside the Union's rotary hiring system; but as the original Wagner Act did " * * * not impose an obligation on the employer to favor union members in hiring employees," *Phelps Dodge Corp. v. N.L.R.B.,* 313 U. S. 177, 186, so the amended Act does not impose an obligation on the employer to favor non-union members in hiring employees. The most that Underwood was entitled to was equality of treatment under the established system. Underwood was at all times afforded that equality; in fact, the record establishes that both the Company and the Union went to great lengths to insure him that equality.

The Board found and concluded (R. 99) that the Company discriminated against Underwood, and that the Union caused the Company to so discriminate by (1) the Union's referral of Lewis Deyo, ahead of Underwood, to the Company's vessel ALASKA on May 5, 1950; and (2) the act of the Union in removing Underwood's name, in the week following January 7, 1950, from the Union assignment lists. Substantial evidence on the record considered as a whole does not support the Board's findings and conclusions in these respects, and the portions of the Board's order predicated thereon cannot be sustained. See *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474; *N.L.R.B. v. Pittsburgh S. S. Co.,* 340 U.S. 498.

A. *Underwood was not discriminatorily refused employment by the Union's referral of Lewis Deyo to the position of Second Assistant Radio Officer on the ALASKA on May 5, 1950.*

The findings and conclusions of the Board that Underwood was entitled to referral and should have been referred by the Union ahead of Lewis Deyo on May 5, 1950, to the Company's vessel ALASKA, are based upon unjustified assumption, conjecture and speculation and not upon substantial evidence of record.

Mr. Lundquist, Port Agent for the Union, testified unqualifiedly that Underwood would not have received assignment to *any* permanent job with the Company between January 7, 1950, and November 8, 1950, under the Union's rotary hiring system, *even assuming that Underwood had remained a member of the Union during that period* (R. 230-1). Lundquist explained this in detail with the aid of written exhibits (R. 230-9, Union Exh. 27). Lundquist also testified that not until November 8, 1950, did the assignment occur of the *last man ahead* of Underwood on the Union's assignment list of January 7, 1950 (R. 239). The clear implication from Lundquist's testimony with reference to the assignment of Deyo to the ALASKA on May 5, 1950, was that Deyo was No. 793 on the Union's January 7 assignment list rather than No. 815 as found by the Board (R. 236, Union Exh. 27). Underwood's number was 796 on the January 7 list (R. 230). The evidence does not establish that Underwood's number was lower than Deyo's number on January 7, 1950, or on May 5, 1950.

But even assuming that Deyo's number was actually higher than Underwood's on January 7, 1950, or on

May 5, 1950, there is nothing other than speculation and surmise to establish that the Union's assignment of Deyo to the ALASKA, and not Underwood, was discriminatory within the meaning of the Act, or was predicated in any way upon union considerations. There is *no evidence* that Deyo was referred to the ALASKA ahead of Underwood *because* Deyo was a Union member, if Deyo was then in fact a member of the Union.

The testimony of Lundquist established that between December 1, 1949, and June 1, 1950, radio operators, both union and non-union, were dispatched indiscriminately from the Union's employment offices if they filed applications (R. 255, 220). Lundquist further testified that the employment opportunities of the Union were made equally available to union members and non-union men between December 1, 1949, and July 1, 1950 (R. 255).

To say that the referral by the Union of Deyo instead of Underwood to the ALASKA on May 5, 1950, was *because* of the preferential hiring provision of the 1948 agreement is entirely unwarranted and in complete disregard of the evidence in the case. The Company wrote Underwood on March 29, 1950, and requested him to register at the Union office for dispatch (Gen. Counsel Exh. 9). On the same date the Company wrote the Union and requested that Underwood be dispatched without any discrimination whatsoever and that his registration with the Union be made effective as of December 29, 1950 (Gen. Counsel Exh. 10). Following receipt of the letters, Underwood went to the Union employment office, requested that he be dispatched and so advised the Company (R. 146-7, 174). The Company

and the Union subsequently agreed in an exchange of correspondence on April 12 and April 19, 1950, that Underwood would be dispatched without discrimination (R. 178). This agreement clearly superseded the applicability of the hiring provisions of the 1948 agreement so far as Underwood was concerned.

Underwood was permitted to register by the Union on April 3, 1950, and was offered at least three jobs by the Union before he left for the Alaska cannery on July 23, 1950 (R. 117-8, 132-4, 138-9). Upon his return from Alaska, Underwood again advised the Union of his availability for limited jobs (R. 194), and was thereafter offered several jobs which he refused (R. 155-7, 239-42).

On this evidence there is clearly no basis whatever for a finding that Underwood was discriminated against by the referral of Deyo to the ALASKA on May 5, 1950. The burden of establishing unfair labor practices is on the General Counsel for the Board. *N.L.R.B. v. Reynolds International Pen Co.,* 162 F.(2d) 680, 690 (C.C.A. 7, 1947); *Interlake Iron Corp. v. N.L.R.B.,* 131 F.(2d) 129, 133-4 (C.C.A. 7, 1942). Unjustified assumption, surmise and speculation are not substitutes for proof. *N.L.R.B. v. Amalgamated Meat Cutters,* 202 F. (2d) 671 (C.A. 9, 1953).

The mere existence of an unlawful preferential hiring provision in an agreement does not in and of itself establish a case of discrimination against a specific individual. It is fundamental that an individual does not suffer discrimination within the meaning of the Act unless he himself is deprived of employment because of

union considerations. *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 188; *Republic Steel Corp. v. N.L.R.B.,* 311 U.S. 7, 10-12; *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 235-6. There is no evidence in this record that the preferential hiring provision of the 1948 agreement was applied to Underwood in the assignment of Deyo to the Alaska, or at all.

It is likewise difficult to perceive upon what theory the Board concluded that any act of the Company with respect to Underwood in this case was discriminatory or encouraged or discouraged membership in a labor organization within the meaning of Section 8(a)(3). Every action that the Company took in these cases, including its correspondence with the Union and with Underwood, was designed to insure equality of treatment for Underwood under the rotary hiring system. There is no evidence that any official of the Company knew whether Underwood was or was not a member of the Union. Underwood did not indicate to the Company that he had resigned from the Union when he filed his employment application with the Company on December 29, 1949 (R. 127-9). Nothing in the subsequent letters written to the Company by Underwood indicated whether he was or was not a Union member (R. 160-1). The only information the Company had with respect to Underwood was that *he opposed the rotary hiring system,* based essentially upon job availability in the industry, and that he believed that the Company should establish a system based upon seniority *with the Company* which would afford him a better chance of securing employment with the Company (R. 160-1). There is no evidence that Underwood ever called to the Com-

pany's attention any facts putting it on notice that his union or non-union affiliation played any part in his opposition to the rotary hiring system. There is no evidence that Underwood ever advised the Company that the normal channels of employment—the employment offices of the Union—were closed to him by reason of lack of union membership, or for any reason at all. There is no evidence that the Company knew of the union membership status of either Deyo or Underwood at the time Deyo was referred to the ALASKA by the Union.

The evidence wholly fails to establish that Underwood was denied employment by the Company because of union considerations or to encourage or discourage membership in the Union. Underwood's failure to secure employment in fact resulted only from the operation of the perfectly legal rotary hiring aspects of the 1948 agreement, to which rotary hiring aspects Underwood was opposed because he preferred a different system. The Company, by its conduct with respect to Underwood, clearly met any and all obligations imposed upon it by the Act.

B. ***The removal by the Union of Underwood's name from the assignment lists of the Union in the week following January 7, 1950, did not constitute discrimination against Underwood.***

The Board found that the Act of the Union in removing Underwood's name from the assignment list in the week following January 7, 1950, in itself constituted discrimination in violation of Sections 8(a)(1) and (3) by the Company and Sections 8(b)(1)(A) and (2) by the Union (R. 99). This conclusion represents a

novel and wholly unwarranted interpretation of the Act.

The act of removing Underwood's name from the *Union* assignment lists *was the act of the Union.* It is indeed a novel doctrine that the Company engaged in discrimination within the meaning of the Act by an act of the Union in which the Company did not participate or acquiesce and of which the Company had no knowledge whatever. See *Progressive Mine Workers of America v. N.L.R.B.,* 187 F.(2d) 298 (C.A. 7, 1951). Furthermore, the Company had no knowledge of Underwood's union or non-union status at the time the removal of Underwood's name from the Union's assignment lists occurred.

Since the very inception of the Act, the Board and Courts have uniformly held that no finding of discrimination can be made unless it be established that the employer had knowledge of the union or other concerted activities involved. "Discrimination involves an intent to distinguish in the treatment of employees on the basis of union affiliations, or activities, thereby encouraging or discouraging membership in a labor organization, * * *." *Botany Worsted Mills,* 4 NLRB 292, 300. See also *Midland Steel Products Co.,* 11 NLRB 1214, 1225; *Tupelo Garment Co.,* 7 NLRB 408, 414; *Hills Brothers Co.,* 76 NLRB 622, 629; *B. F. Goodrich Co.,* 88 NLRB 550, 552-3; *N.L.R.B. v. Westinghouse Electric Corp.,* 179 F.(2d) 507 (C.A. 6, 1949); *Tampa Times Co. v. N.L.R.B.,* 193 F.(2d) 582 (C.A. 5, 1952); *Progressive*

Mine Workers of America v. N.L.R.B., 187 F.(2d) 298 (C.A. 7, 1951); *Brown v. National Union of Marine Cooks and Stewards,* 104 F. Supp. 685 (N.D. Calif., 1951). There is no basis whatever for the Board's finding that the Company *discriminated* against Underwood by reason of *the act of the Union* in removing Underwood's name from the Union's assignment list.

The Board's position that the Company was accountable for discrimination against Underwood by virtue of the act of the Union in removing Underwood's name from the Union's assignment list is predicated upon the hiring clause of the 1948 agreement which provided preference of employment for Union members (Gen. Counsel Exh. 3, §1). The Board argues that, by virtue of the preferential hiring provision, and the Union's shipping rules then existing, the Company impliedly authorized the removal of Underwood's name from the Union list upon his resignation from the Union (Petitioner's Brief, pp. 19-20).

This argument is not sound because it assumes unjustifiably that a preferential hiring provision will in fact be applied to specific individuals. This unjustified assumption of the Board is completely belied by the evidence in this case which clearly establishes that the Company, upon learning of Underwood's opposition to the Union's rotary hiring system, (1) wrote to Underwood requesting that he register at the employment offices of the Union (Gen. Counsel Exh. 9), (2) wrote to the Union requesting that Underwood (and Hughes) " * * * be dispatched without discrimination as to union

or non-union affiliation or other discrimination whatsoever, anything in our collective bargaining agreement to the contrary notwithstanding" (Gen. Counsel Exh. 10), and (3) subsequently obtained an agreement from the Union that Underwood (and Hughes) would be dispatched without discrimination (R. 178).

Furthermore, the Union interpreted Underwood's letter of resignation (Union Exh. 6) as meaning that Underwood no longer wished to ship through or utilize the Union's employment offices (R. 181, 254). This interpretation of the letter is entirely reasonable and is confirmed by Underwood's own action in applying directly to the Company for employment *even before* his resignation from the Union became effective (R. 126-9, Gen. Counsel Exh. 8). Upon receipt of the Company's letter of March 29, 1950 (Gen. Counsel Exh. 9) Underwood proceeded to go to the Union's employment office to request dispatch in accordance with the Company's request contained in the letter (R. 146-7, 174). Underwood was thereafter offered jobs in normal course through the Union's employment facilities (R. 116-7, 132-4, 138-9, 155-7, 239-42).

Upon this evidence, the Board's finding (R. 99) cannot be sustained that "the act of removing Underwood's name from the assignment list in itself constituted discrimination in violation of Section 8(a)(1) and (3) of the Act by the Respondent Employer and Section 8(b)(1)(A) and (2) of the Act by the Respondent Union."

II. Assuming *arguendo* that discrimination occurred, the Board's order is improper and invalid.

A. *If discrimination occurred, the Board erred in failing to find that the Union was solely responsible therefor, and in failing to order that the Union only should be required to make Underwood whole for resulting loss of wages, if any.*

The Board order directs that the Company and the Union jointly and severally make Underwood whole for any loss of wages suffered as a result of alleged discrimination (R. 104).

The power of the Board to assess back pay liability stems from Section 10(c) of the Act. That section, as amended in 1947, provides that when the Board finds that a union or employer has engaged in unfair labor practices it shall—

> " * * * issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him*: * * *." (Emphasis supplied)

The italicized portion of Section 10(c) quoted above was added by Congress in 1947 to clarify the remedial powers of the Board following insertion in the Act of Section 8(b) setting forth and defining union unfair labor practices. Following 1947 the Board has held unions liable for back pay only upon a finding that a un-

ion, in violation of Section 8(b)(2), has caused an employer to discriminate against an employee within the meaning of Section 8(a)(3). See *Colonial Hardwood Flooring Co.,* 84 NLRB 563. Where both union and employer are parties to the proceedings, the Board has failed and refused to assess responsibility for discrimination in any case solely against a union but has imposed a rule of joint and several liability against both employer and labor organization. *H. M. Newman,* 85 NLRB 125; *Acme Mattress Co., Inc.,* 91 NLRB 1010. See *N.L.R.B. v. Pinkerton's National Detective Agency, Inc.,* 202 F.(2d) 230 (C.A. 9, 1953).

This policy of the Board runs directly counter to the clear legislative mandate set forth in the proviso to Section 10(c) that " * * * back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * *." The statute clearly directs the entering of a back pay order against the employer *or* labor organization, *as the case may be, responsible* for the discrimination, and in effect *directs the Board to determine the responsible party or parties* upon the facts of the particular case. The legislative history demonstrates the intent of Congress. In *House Report* No. 245 on H. R. 3020, 80th Cong., 1st Sess., the Committee Report stated at page 42 that under the above quoted clause of amended Section 10(c) " * * * the Board may also require a union to reimburse to an employee whom it causes to lose pay the amount that he loses." In *Senate Report* No. 105 on S. 1126, 80th Cong., 1st Sess., the Committee Report stated at page 26 with respect to amended Section 10(c) that "Back pay may be required of either the employer

or the labor organization depending upon which is responsible for the discrimination suffered by the employee." *House Conference Report* No. 510 on H. R. 3020, 80th Cong., 1st Sess., at page 54 referred to the amended Section 10(c) as containing a provision " * * * authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees."

On the basis of the record in this case it is manifest that the Union was solely responsible for the discrimination, if any, suffered by Underwood. This is *not* a case where the employer *knowingly* acquiesced in coercive acts of a union, by virtue of economic pressure or otherwise. *Cf. N.L.R.B. v. Pinkerton's National Detective Agency, Inc.,* 202 F.(2d) 230 (C.A. 9, 1953). Here the Company had no knowledge of and did not acquiesce in *any* act of the Union resulting in any alleged loss of employment to Underwood. On the contrary, the Company here made every effort to insure equality of treatment to Underwood and initiated and secured an agreement with the Union removing the applicability of the preferential hiring provision of the 1948 agreement so far as Underwood was concerned (R. 178).

If discrimination occurred as alleged in this case the Union was the party solely responsible. The Company cannot be held accountable. The basic purposes of the Act can only be effectuated by assessing back pay liability solely against the Union as the party responsible in accordance with the mandate of amended Section 10(c).

The "joint and several liability" formula consistent-

ly applied by the Board is not immutable. See *Acme Mattress Co., Inc.,* 91 NLRB 1010. The Board is charged with the administration of the Act and with the administrative function of ordering a remedy which *will effectuate the purposes of the Act.* The remedies are not fixed and static but are fluid and adaptable to meet the facts of particular cases. In selecting a remedy, the Board cannot act in utter disregard of the manifest intent of Congress. The Courts have never failed to deny enforcement to Board orders where the remedy directed fails to effectuate the purposes of the Act. *N.L.R.B. v. Fansteel Met. Co.,* 306 U.S. 240; *Southern S. S. Co. v. N.L.R.B.,* 316 U.S. 31; *Indiana Desk Co. v. N.L.R.B.,* 149 F.(2d) 987 (C.C.A. 7, 1945); *N.L.R.B. v. Westinghouse Electric Corp.,* 179 F.(2d) 507 (C.A. 6, 1949).

B. *If discrimination occurred, the Board erred in failing to find and affirmatively order that Underwood should not be offered employment or awarded back pay because his unwillingness to accept employment opportunities amounted to a willful incurrence of wage losses.*

The evidence clearly establishes that Underwood voluntarily engaged in a program of refusing employment offers whereby he willfully incurred wage losses. The record establishes that Underwood was offered at least three jobs by Miller, Port Agent for the Union, which he refused (R. 118, 133-4, 138-9). Following his return from Alaska, Underwood was offered several jobs by the Union between October 9, 1950, and February 27, 1951, all of which he refused (R. 155-7, 239-41). He consistently followed the practice of limiting the categories

of jobs for which he was available (R. 194-5, 241-2, Union Exh. 7).

In view of this evidence, it is clear that Underwood willfully incurred wage losses and no order directing his employment or back pay order should issue in his favor. The Act is remedial, not punitive. *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 235-6; *Republic Steel Corp. v. N.L.R.B.,* 311 U.S. 7, 10-12.

C. *If discrimination occurred, the Board erred in failing to find and affirmatively order that any award of back pay in favor of Underwood should terminate not later than October 14, 1950.*

The Board ordered (R. 100, 104) that back pay in favor of Underwood should run from May 3, 1950, to October 14, 1950, inclusive, and from the date the ALASKA returned to service after October 15, 1950, until the Company offered him employment (R. 73-4, 76-7).

The ALASKA laid up for the winter on October 14, 1950 (R. 120-3, 125, Gen. Counsel Exh. 7). The assumption that Underwood would have elected to "stand by" the vessel for a long period of idleness, or should be permitted back pay on any such speculative basis, is contrary to the evidence and to the remedial intent of the Act. Employment opportunities were greater than men available during the winter of 1950-51 (R. 214-5). The evidence also indicates that Dittberner, who was employed on the ALASKA until October 14, 1950 (Gen. Counsel Exh. 7), accepted assignments to the COASTAL MONARCH on or about December 21, 1950, and to the COASTAL RAMBLER on January 31, 1951 (Union Exh. 12,

Gen. Counsel Exh. 7) and did not elect to stand by the ALASKA. Deyo, also employed on the ALASKA until October 14, 1950 (Gen. Counsel Exh. 7) accepted assignment to the HAROLD D. WHITEHEAD on February 5, 1951 (Union Exh. 13), and did not elect to stand by the ALASKA. George D. Johnston also gave up his right to stand by the ALASKA and returned to the Union's active port list (Union Exhs. 9, 10, 11, 12).

Furthermore, the evidence establishes that Underwood was offered and accepted a permanent job on the PACIFICUS, a Coastwise Line vessel operating in the Alaska trade (R. 202-3, 241). This is in all respects equivalent employment as evidenced by the fact that Coastwise Line is a member company of PMA and is governed by the same collective bargaining agreement so far as radio operators are concerned (Gen. Counsel Exh. 3).

In view of the full employment opportunities during the winter following October 14, 1950, and in view of the fact that Underwood was offered and accepted employment on the PACIFICUS, the Board order directing back pay in favor of Underwood following October 14, 1950, is out of harmony with the evidence and with the remedial purposes of the Act. The Board order cannot be sustained in this respect.

CONCLUSION

The Company requests that the Court enter a decree denying the petition herein and refusing to enforce the Board's order, and setting aside the Board's order in its entirety as to the Company or, alternatively, that

the Board's order be modified in such respects as the same may be found to be improper.

Respectfully submitted,

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Alaska Steamship Company.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), are as follows:

* * *

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an un-

fair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of

collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * * "

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * "

* * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * "

* * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the procedings, including the pleadings and testimony

upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * "

Section 8 (a) (3) was amended in part by Public Law 189, 82d Congress, Chapter 534, 1st Session, approved October 22, 1951. The amendment (Section 18 (b)) provided as follows:

"Sec. 18 * * *

* * *

"(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads '; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:' and inserting in lieu thereof the following: 'and has at the time the

agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:' ''

* * *

No. 13,559

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALASKA STEAMSHIP COMPANY and
AMERICAN RADIO ASSOCIATION, CIO,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT AMERICAN RADIO ASSOCIATION, CIO.

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Attorney for Respondent American Radio Association, CIO.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ALASKA STEAMSHIP COMPANY and
AMERICAN RADIO ASSOCIATION, CIO,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT AMERICAN RADIO ASSOCIATION, CIO.

JURISDICTION.

The National Labor Relations Board, herein called the Board, has brought this case before the Court, pursuant to Section 10(e) of the National Labor Relations Act, as amended,[1] herein called the Act, for enforcement of its order issued on February 11, 1952, against

[1] 61 Stat. 136, 29 USC, Supp. V, Sec. 151 et seq. Relevant portions of the Act appear in the Appendix, at the end of this brief. Unless otherwise stated, references in this brief are to sections of the Act.

Alaska Steamship Company, herein called the Company, and American Radio Association, CIO, herein called the Union. This Court has jurisdiction of these proceedings under Section 10(e) of the Act. The Board's decision and order (R. 24-86, 97-105), are reported in 98 NLRB 22.

I. STATEMENT OF FACTS.

A. The Union.

The Union is a labor organization within the meaning of the Act, admitting to membership employees of the Company (R. 28).

B. The Company.

The Company, a Washington corporation, with its principal place of business in Seattle, is primarily engaged in the maritime industry, in the operation of ocean-going vessels for the transportation of persons and cargo between continental ports of the United States and ports in the Territory of Alaska (R. 9-10, 18, 28, 125).

C. The Issues; Subsequent Determinations by the Board; Proceedings in this Court.

Horace W. Underwood, a marine radio officer, first filed charges against the Company and the Union in January, 1950. Amended charges were filed against the Company on March 20, 1950, and against the Union on January 22, 1951 (R. 3, 5, Gen. Counsel Ex. 1).

A consolidated complaint against the Company and the Union, issued by the Board on the latter date,

charged in substance: (1) that on December 3, 1948, the Union and the Company entered into a collective bargaining contract (later amended on July 14, 1950), which provided that the Company would secure its marine radio officers for its vessels from offices of the Union and that the contract contained preferential hiring provisions which violated the permissible limits prescribed in Section 8(a)(3);[2] (2) that effective May 15, 1949, shipping rules, implemented by assignment lists, were administered by the Union, according to which the Union allegedly restricted referrals to positions as radio officers with the Company and other employers, to Union members; and (3) that the Company, by acquiescing in and consenting to such practice of obtaining radio officers from the Union, whereby the Union allegedly refused to dispatch Underwood to employment as a radio officer with the Company or any other employer following December 1, 1949, engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3), and that the Union engaged in unfair labor practices within the meaning of Sections 8(b)(2) and (1)(A) (R. 9-18).

The Union filed answer in which it admitted the jurisdictional allegations and also admitted the execution of the contracts above referred to. It denied that it had engaged in unfair labor practices (R. 21-22). The Company in its answer admitted the jurisdictional

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[2]Actually, the contract and the amended contract were entered into between the Union and an employers' association of which the Company was a member, with the same force and effect as though entered into between the Company and the Union (Gen. Counsel Exs. 3 and 4).

facts relating to its business, but denied that it had engaged in unfair labor practices (R. 18-21).

Following hearings and the taking of testimony, a Trial Examiner for the Board issued his intermediate report and recommended order on July 3, 1951 (R. 24-87), to which both the Company and the Union duly filed exceptions (R. 87-91, 92-97).

On February 11, 1952, the Board issued its Decision and Order (R. 97-105). The Board filed petition for enforcement of its order in this Court on September 30, 1952 (R. 265-267), to which the Company and the Union respectively filed answers on October 15, and December 1, 1952 (R. 270-290).

By stipulation of the parties, none of the exhibits which have been introduced need be printed and this Court may use and consider the original exhibits which are on file in the case (R. 291-292).

D. The Labor Relations Between Respondents.

On December 3, 1948, the Pacific American Shipowners Association, herein called PASA, entered into a collective bargaining agreement (herein called 1948 agreement), with the Union (Gen. Counsel Ex. 3), in behalf of the Company and other employers. In part the contract provided as follows (Gen. Counsel Ex. 3, p. 2):

> "PREFERENCE OF EMPLOYMENT
>
> Section 1. Employers agree to recognize the Association as the authorized collective bargaining agent for all Radio Officers employed by the Em-

ployers and when filling vacancies preference of employment shall be given to members of the Association.

HIRING

Section 2. The names of all unemployed members of the Association shall be placed on the Association's unemployed lists at the various offices of the Association. The offices of the Association shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made. For the purpose of promoting safety of life and property at sea, and to guarantee as far as is practical equal distribution of work among all members of the Association, the parties hereto agree that vacancies shall be filled in the following manner. Preference shall be given the Radio Officer longest unemployed who can present proof of previous employment and/or experience on a job or jobs similar to that which is offered, and who in the judgment of the Employer is qualified, competent, and satisfactory to fill the job.

When any Radio Officer is rejected, the Employers shall furnish a statement in writing to the Association stating specifically the reason why he is not qualified, competent, or satisfactory to fill the job. * * *"

In 1949 the Pacific Maritime Association, herein called PMA, succeeded PASA as the employer association, and the subsequent contract involved herein was entered into between the PMA and the Union (Gen. Counsel Ex. 4).

In *Pacific Maritime Association,* 89 NLRB 894, the Board previously considered the validity of the hiring provisions of the 1948 agreement. The import of the decision there is unrelated to the issues before this Court. On April 28, 1950, the Board found that the mere execution of the 1948 agreement, which contained unlawful preferential hiring provisions, violated Section 8(a)(1), and ordered PMA (as successor to PASA) to cease giving effect to the 1948 agreement. In compliance, PMA and the Union signed a new agreement on July 14, 1950, herein called the 1950 agreement, and made it effective April 28, 1950 (Gen. Counsel Ex. 4). The 1950 agreement contained no provision giving preference of employment to members of the Union (Gen. Counsel Ex. 4, p. 2).

The General Counsel charged in this case, that the 1950 agreement contained unlawful preferential hiring provisions. Upon the Trial Examiner's recommendation, the Board dismissed such allegations. Likewise, the Trial Examiner recommended dismissal of, and the Board dismissed the complaint to the effect that any discrimination occurred in the administration of the 1950 agreement (R. 41-47).

Inasmuch as the validity of the hiring provisions contained in the 1948 agreement (Gen. Counsel Ex. 3) had already been litigated in Case No. 20-CA-166 (89 NLRB 894) and since the 1950 agreement superseded the 1948 agreement, that issue was not relitigated in this case (R. 39-40). Therefore, the only issues here involved relate to the alleged discrimination against Horace W. Underwood.

E. Facts Relating to Horace W. Underwood.[3]

The Company has utilized the employment offices of the Union, or its predecessors, to secure sea-going radio officer personnel since 1935. The Company maintains no facilities for hiring such personnel directly. The practice in the industry to secure other categories of sea-going employees, has likewise been through the employment offices of the collective bargaining agent representing employees in a particular classification involved (R. 256-257).

Underwood was continuously employed as radio officer by the Company on the COASTAL RAMBLER commencing April 2, 1949, and terminating on or about August 6, 1949 (R. 110-113, 140-142). It was a permanent job (R. 142-143, 154, 166, 170, Union Ex. 5). At that time, as a member of the Union (R. 110, Union Ex. 6), Underwood was dispatched to the vessel by the Union (R. 142). On or about August 6, 1949, the COASTAL RAMBLER laid up, became inactive, and the entire crew paid off, including Underwood (R. 141). At that time, under rules uniformly applied in the operation of the Union's rotary hiring system, Underwood had a recognized union right to "stand by" his job on the COASTAL RAMBLER and to sail with the vessel when she next resumed active operation (R. 142-143, 167-168). However, Underwood decided to draw unemployment compensation. Under applicable rules and regulations of the State Unemployment Compensation Department, Underwood could not "stand

[3]This section includes also some of the material in Company's brief from middle of page 6 to page 14 thereof.

by'' his job and draw unemployment compensation, because, to be eligible he was required to be actively seeking employment (R. 137, 142-143, 150, 164-165, 168). Since Underwood had decided to draw unemployment compensation, he had to relinquish his right to ''stand by'' the job on the COASTAL RAMBLER (R. 143, 167). He was then placed on the ''active'' list at the employment offices of the Union on August 10, 1949, for subsequent dispatch in normal course under the rotary hiring system (R. 144, 166-169, Union Ex. 5).

On or about September 14, 1949, Underwood took a ''relief'' job through the Union's rotary hiring system, on the PALISANA (R. 113-114, 145-146, 159-160, 233, Union Ex. 5). It ''laid up'' on November 22, 1949 (R. 114, 146), and the crew, including Underwood, paid off (R. 145, Union Ex. 5). The effect was to put Underwood back on the Union's ''active'' list, in a position lower than what it was on September 14, 1949, when he took the PALISANA job. This was so because under the principles of rotary hiring in the Union, Underwood, as an ''employed'' radio officer, dropped 30 places per week on the Union's assignment list during his period of employment. That was true whether a radio officer was then employed on a relief or permanent job (R. 114-155, 118, 139-140, 192-193).

At the time his relief job terminated on the PALISANA on October 21, 1949, Underwood claimed that under the *old* shipping rules of the Union no longer in effect, he would have been entitled to keep the job on the PALISANA as a *permanent* one

when the vessel next sailed (R. 113). The evidence clearly shows, however, that under the shipping rules then applicable, Underwood's "relief" job terminated and in the normal course of dispatch, the position on the PALISANA was properly offered to the men next on the assignment list (R. 114-115, 176-177).

Underwood was then placed on the Union's "active" list, under the rotary hiring system, on December 1, 1949 (R. 131, Union Ex. 5). During the period just discussed, Underwood was a member of the Union (R. 110, Union Ex. 6) and had been dispatched to vessels operated by the Company through the employment offices of the Union (R. 142, Union Ex. 5).

The evidence thus far reviewed is highly significant. It pointedly demonstrates the basis for certain unwarranted antipathies by Underwood against both the Union and the Company. It is the starting point of his subsequent conduct. An understanding of this background is pertinent in appraising the conduct of the Union and the Company in this case.

For some years past, and at the pertinent times material to this case, Underwood had wanted to work *only* in a *permanent* job, and *only* on *vessels operated by the Company.* He consistently refused job opportunities with other companies (R. 115-118, 138-139, 147-149, 155-157, 172-173). As a result, Underwood believed that the rotary hiring system operated unfairly as to him. He rationalized that a "permanent" job only with the Company would be to his advantage because all other radio officers, competing with him,

were seeking *all job opportunities with all companies* under the rotary hiring system (R. 149, 153). Underwood described this condition as "discrimination" against him. Obviously it has nothing to do with "discrimination" as defined in the Act, since no element of union or non-union affiliation enters the picture at all. Underwood described the rotary system of job dispatches as a "roulette wheel" (R. 163-164).

Because he believed that the rotary hiring system operated unfairly against him, Underwood "got mad" at the Union and by letter resigned his membership on December 28, 1949 (R. 113, 115, Union Ex. 6). His testimony and the letter of resignation establish his reason for resigning to be *his personal opposition to the rotary hiring system,* and not because of any union or non-union aspects thereof. He quit the Union solely because of his belief that the system operated unfairly as to him in his desire to achieve a permanent job with the Company (R. 114-115, 149, Union Ex. 6).

The Union interpreted Underwood's letter of resignation to mean that he no longer wanted to ship through, or to utilize, the employment offices of the Union (R. 181, 254), and after January 7, 1950, his name was removed from the Union's national assignment list (R. 230, 251).

Just *before his resignation from the Union, Underwood* attempted to secure employment in *preference* to those on the Union's rotary hiring list, by applying directly to the Company for a position as marine radio officer (R. 126-129, Gen. Counsel Ex. 8). Likewise,

after his resignation from the Union, he expressed an interest, in correspondence with the Company between March 3, 1950 and May 25, 1950, to obtain employment directly from the Company without reference to the rotary hiring system (R. 160-161). Underwood expressed his opposition to the rotational hiring system of assignment of radio officers. Underwood maintained his preference for a system of hiring based upon seniority *with one company.* In his judgment this would have afforded him a better chance of employment by the Company (R. 160).

In response to some of Underwood's letters and to his application for employment theretofore filed with the Company, it wrote and advised him to register for employment at the shipping industry's employment office (for radio officers) on the Union's premises, whose services the Company used to man its vessels with radio officers. The Union was also notified of this course of correpondence (Gen. Counsel Exs. 9 and 10).

Upon receipt of the Company's letter (Gen. Counsel Ex. 10), Underwood went to the employment offices of the Union, requested to be dispatched, and he subsequently advised the Company of his action in this respect (R. 146-147, 174).

On April 12, 1950, the Company wrote to the Union enclosing a letter of April 3, 1950, which it had received from Underwood. According to the Company's interpretation, Underwood expressed the opinion that the Union would discriminate against him. On April 19th the Union reassured the Company that as always

Underwood would be dealt with indiscriminately (R. 178). Subsequent to this exchange of correspondence Underwood did not advise the Company of any alleged instances of discrimination against him in the use of the normal channel of employment—the hiring offices of the Union—*and the evidence establishes that in fact there were no instances of any discrimination against Underwood.* Underwood himself did not deny that the shipping rules were at all times applied as equally to him as to members of the Union.

The undisputed testimony of Lundquist, Seattle Port Agent for the Union, establishes that between December 1, 1949, and July 1, 1950, radio officers, both union and non-union, were dispatched indiscriminately to employment if they filed written job applications (R. 220, 255). Under the "old" shipping rules opportunities in the industry were made equally available to union and non-union members at the Union's employment office between December 1, 1949, and July 1, 1950 (R. 255). After the "new" shipping rules were adopted in June 1950, following the Board's order in *Pacific Maritime Association,* 89 NLRB 894, the same indiscriminate treatment was again afforded to union and non-union men alike. *Between June 1950 and February 1951 (just before the hearing was held in this case) the Union's shipping lists show that following an indiscriminate method of job referrals as to union and non-union men alike, the Union had dispatched 51 non-union men to jobs (Union Ex. 26).*

After December 1949, Underwood persistently refused to register for work at the Union's employment office (R. 254-255). This is how Port Agent Lundquist put the matter:

> "A. * * * The answer to that question is what I have already stated, that Mr. Underwood has never come in to me or to anyone else in the office while I have been here or at any time prior that I know of and registered to go on the assignment list. The list is made up and assignments are made in accordance with a set of rules which is national in scope, and which is definitely just as applicable to the Seattle branch as anywhere else. I have no right to deviate from those rules, and neither has any other port official who may place Mr. Underwood's name or anyone else's name on that national list, unless such applicant for employment as a radio officer specifically fills out—and all he has to fill out is his signature because I fill in the rest of the data indicating his name, the port where he wants to ship from, and the date he goes on the list." (R. 219-220.)

In the hope of avoiding trouble, and despite Underwood's refusal to register, Lundquist nevertheless accorded him *preferential treatment* to which he was not entitled under the employment office shipping rules adopted in June 1950. Lundquist testified in this regard as follows:

> "Now, because * * * I have no desire to persecute Mr. Underwood or anybody else * * * I felt that I was bound in my own conscience to hold him available for assignment in some manner, even though

> I could not list him on a master assignment list (i.e., because of Underwood's refusal to register), and I had to figure out to my own satisfaction and in my own mind according to the facts I had, what I could ascertain from Miller and Underwood, as to his length of employment, his possible registration date, and how that would affect him on the list.
>
> Mr. Underwood would not agree with that, and he would never fill out an assignment slip which would permit his name going on the master list." (R. 220.)

At all times subsequent to April 3, 1950, Underwood received equal treatment in the normal channel of employment, the employment offices of the Union. He was offered at least three jobs by Miller, then Port Agent for the Union (R. 116-117, 132-133, 138-139), all of which Underwood refused. During the summer of 1950, Miller attempted to contact Underwood and found that he was employed in an Alaska cannery since July 23, 1950 (R. 134, 254). Following Underwood's return from Alaska on October 9th, he contacted Lundquist, who had replaced Miller as Port Agent for the Union in September 1950. He told Lundquist that he was available for employment, but *only in certain limited categories of jobs*—i.e., *permanent* assignments to vessels of the Company only, engaged in *short runs* (R. 194). Underwood was offered a number of jobs between October 9, 1950 and February 27, 1951, all of which he refused because they did not meet his requirements (R. 155-157, 239-242). On the latter date, and

at *the very moment* that Underwood lifted the prior restrictions as to his desire for work only with the Company, he was dispatched to, and he accepted, a permanent job on the PACIFICUS, a vessel operated in the Alaska trade by the Coastwide Line (R. 171, 241).

Underwood himself testified that at this time, according to his own best judgment, based upon his position on the "active" Union assignment list when he terminated on the PALISANA in November 1949, that *"without the Korean war I would not have been employed on the Alaska (Steamship Company) ships until the spring of 1951"* (R. 114-115, 175-176). This was confirmed by Lundquist who said it was due to a general slump in shipping and because of unemployment conditions in the industry (R. 186-187, 228-229). Even so, Underwood would not have received assignment to Alaska vessels of the Company between December 1949 and November 8, 1950, *notwithstanding* the intervening Korean war. That is clearly established by the chronological history of jobs filled on vessels of the Company during that period (Union Ex. 27, R. 230-239). Even if Underwood had remained a member of the Union during that entire period, he would not, under the normal operation of the Union's rotary hiring system, have been referred to any permanent job on vessels of the Company between December 1949, and November 8, 1950.

II. SUMMARY OF FACTS AS TO UNDERWOOD.

A. The Gist of Underwood's Self-Created Difficulties.

The following colloquy between the Trial Examiner and the Board's General Counsel, in a nutshell, points up the problem in the case:

> "Trial Examiner Hunt. Was it Underwood's testimony that he wanted a job in that run (the Alaska Steamship Co.) with any company other than the respondent company,
>
> Mr. Teu. He wanted an Alaska Steamship Company ship.
>
> Trial Examiner Hunt. Is that your recollection of his testimony, Mr. Teu?
>
> Mr. Teu. *I don't think* there is any testimony to the effect that *he would have taken* an assignment on *any other lines shipping in the Alaska trade.* I don't recall any to that effect." (R. 253.) (Emphasis supplied.)

This discussion came at the end of the case, when the Board's attorney was in a position to appraise all of the testimony.

The gist of Underwood's welled-up, subjective, "persecution complex" leading him to believe that the Company and the Union sought to deprive him of the opportunity to follow his calling, is best portrayed by the following all-party stipulation. Between April 1, 1949 (nine months before his resignation from the Union) and July 3, 1950 (approximately when the Union's "new" shipping rules took effect), Underwood, in writing, took the following positions (R. 157-159):

1. He opposed the rotational system of indiscriminately assigning radio officers to jobs in the industry.

2. He wanted employment *only* with the Employer —thus self-limiting his employment opportunities to only one out of some thirty-odd shipping companies, covered by the contract between the Union and PMA.

3. He refused to compete with other radio officers for jobs with the Employer.

4. Since 1946, Underwood has always stated to the officials of the Union that he wanted work *only* with the Company.

5. He was aware that by holding a relief job (i.e., his job on the PALISANA to which he was assigned on September 14, 1949) would require that he, in accord with the usual practice, would drop 30 places on the assignment list for each week of employment.

6. He opposed the spread-the-work limit of 90 days "stand by" and maintained, that although found desirable by the Union and its members, he thought it was not a good rule for employees of the Company.

7. He knew, upon taking it, that the PALISANA was a relief job, and that in doing so, he "sacrificed all my (his) chances on the list and gambled on whether the relief job on the PALISANA may eventually become permanent * * *" (R. 159-160.)

8. By reason of the length of his employment on the S/S COASTAL RAMBLER in 1949, Underwood actually dropped to the bottom of the list by the rule of dropping 30 places weekly for each week of employment.

It was further stipulated (R. 160-161), that between early March and the end of May 1950, Underwood claimed in a series of eleven letters to the Company that:

1. His only interest was to get a job with the Company to the exclusion of all other Companies.

2. He was opposed to the Union's rotational system.

3. That hiring into the Company, *based only on seniority with it alone,* would have afforded Underwood a better chance for a job.

The overall picture of the matter just reviewed, shows that what Underwood was seeking for himself were disparate privileges and advantageous treatment, not accorded other radio officers in the industry whether they were union or non-union members. In fact, had either the Union or the Company been willing to abide by Underwood's misconceptions as to what he was entitled to under the law, discrimination in reverse would in fact have been practiced, i.e., radio officers in the industry would have been discriminated against by the preferential treatment which Underwood was demanding.

Underwood's warped ideas (really misconceptions), of the respective rights and obligations of the parties to this litigation, which began an unbroken chain of his personal disappointments, is sharply focused by his belief that the PALISANA job was a *permanent* assignment, when in fact the official assignment slips of the Union (Union Ex. 5) shows the contrary. Whether the job was permanent or temporary, whether he

was a union or non-union man, his work upon the PALISANA would have, in his own words, "dropped (him) so far down that without the Korean war, I (he) would not have been employed on the Alaska ships until this Spring of 1951." (R. 114-115.)

Underwood admitted that when he terminated the PALISANA job, he went back to the rotational hiring list to his "relative position" as of that date (R. 156). His conception as to relative rights of radio operators as compared to those of employees in other departments on the Company's vessels, particularly "the Master and the mates and the rest of the licensed officers" with respect to seniority rights which the latter enjoy and, as he thought, the radio officers do not possess, is again revealing as to Underwood's unjustified sense of outrage. He desired work only with the Company because "they have almost a monopoly on that run"; he wanted work only in the Alaskan trade and would not accept any other job off-shore except under "duress". Therefore, he made no application for, nor would he seek any other job (R. 148-153). Underwood himself said:

> "Q. So that you mean, as I understand your testimony, that you only want to work for the Alaska Steamship Company?
>
> A. Of course, since they have almost a monopoly on that run.
>
> Q. You want to work in the Alaska trade?
>
> A. That is right. I want to work in the Alaska trade.
>
> Q. Only?
>
> A. Only.

Q. You would not accept a job on any other steamship run offshore?

A. Not except under duress." (R. 148.)

On cross examination, he admitted that the Union's shipping rules were equally applied to him, as they were to others in the Union's Seattle branch. The following colloquy between Underwood and the Trial Examiner pointed up his difficulty:

"Q. Was your effort to secure both a permanent and temporary job with the Alaska Company, or just a permanent job?

A. I wanted to get a permanent job because a temporary job puts you down on the list, and you would never have a permanent job as long as there is a beach list." (R. 173.)

Even as to *permanent* assignments, Underwood limited his availability to short runs only, i.e., of approximately three weeks duration (R. 194). The Board so stipulated (R. 253). On December 13, 1950, Underwood for the first time changed his availability from *permanent* to *temporary* assignments. However, he still limited his availability for employment only by the Company (R. 107-108). As to his conversation with Lundquist on that day, Underwood admitted that the former said "I can't discriminate against you" nor "against any other members" (R. 136).

As to the need for registration at the union hall for an assignment to a job, Underwood admitted the long established practice, confirmed in detail by Port Agent Lundquist. It was as follows: one copy of the assign-

ment slip (Union Ex. 5) is usually retained by the registrant for work and "one copy goes to the main office (of the Union) in New York." That is the only means by which his name could be placed upon the Union's national job assignment list. (R. 131-132.)

In March 1949, Underwood agreed, in writing, to abide by the Union's normal and reasonable rules (Union Ex. 4), which the proviso of Section 8(b)(1)(A) of the Act, as amended, protects. As to dispatching him as an unemployed radio officer to a job, Underwood admitted the obvious, i.e., that if he, as a non-union man does not come in to the union hall to apply for, and to register in writing for a job, and make known his availability—the Union would not know of his unemployment (R. 162). He further admitted that an assignment slip must be signed each time a man's category changes (R. 170). Despite this necessary practice, he refused to register with the Union and to sign a registration slip between December 1, 1949 and February 27, 1951. On the latter date, *for the first time* since he had resigned from the Union, Underwood indicated to the Union that he would take a job other than a permanent one with the Company. In fact, he admitted that he "did not go near the Union (after he resigned in December 1949) until the Alaska Steam wrote me (in March 1950) and told me to go there (to the union hall) and register." (R. 173.)

The Board has found that the shipping rules, by means of which the assignments are made to vacant jobs, are lawful, and their application to union and non-union radio officers are non-discriminatory (R. 39-

47, 98-105). The Union, by every means, has operated its employment office within the law. Since the Union operates an employment office, non-union men necessarily must be required to take their turn along with union members in job referrals, for obviously, the Act does not require preferential treatment by an employment office so as to *prefer* non-union over union registrants.

Of the shipping rules enacted in June 1950 (Union Ex. 1), Nos. 5(a), (b), 6(a), (b) and (c) are immediately relevant. They provide:

5(a) —that radio officers must register as "active", meaning available for work, in a specific branch office of the Union.

5(b) —a place on the national shipping lists depends on the time when such application is "actually" received in the port branch of the Union.

6(a) —an applicant must fill out in full, an assignment slip.

6(b) —each branch is required to forward the assignment slips to the national office of the Union.

6(c) —the National Secretary is required to retain all application slips.

Moreover, as recognized by the Board (R. 41), the Federal regulations covering the maritime industry impose additional and very serious obligations upon an employment office dispatcher before he refers a man for a job aboard American flag vessels. Consequently, a maritime employment office dispatcher, before he can send a radio officer to fill a vacancy, must, by law,

check for the following three qualifications, before he can refer a man to obtain a marine radio job in the trade in which the Company is engaged (R. 222-227):

1. A license by the Federal Communications Commission.

2. Since the summer of 1948, a license by the U. S. Coast Guard as a condition to the right to be designated as a radio officer by Congressional Act (Public Law 525, 80th Congress, Second Session).

3. Since October 1950, the U. S. Coast Guard must "screen" all seamen (including, of course, radio officers) as to their loyalty and security risk status (Executive Order 10173, October 18, 1950; Fed. Reg. 7005, interprets or applies 40 Stat. 220, as amended, 50 USC, 191).

In order that a dispatcher in the employment office operated by the Union may properly carry out the contractual obligation of the Union to dispatch men *"qualified, competent and satisfactory"*, as provided in Section 2 (3rd paragraph) of the July 14, 1950 agreement (Gen. Counsel's Ex. 4), and "maintain, administer and operate its employment office * * * in accordance with the law * * *" (4th paragraph), *registration in writing is necessary, in order to check for the 3 qualifications above set forth, before an applicant, be he a union member or not, can be dispatched.* It has been shown that Underwood consistently refused to file his written application, thus preventing the Union from abiding by its contractual as well as the Government regulations above reviewed.

The Union has further demonstrated that after November 8, 1950, while Underwood was then ahead of others on the lists with relation to his numerical standing when he resigned, he could not have been assigned to a job with the Company because he himself imposed limitations of "temporary" and "short run" assignments on the Company vessels excluding jobs in trades other than the "Alaska" trade.

Underwood's absence from the national list was explained on the basis of his refusal to register at the Union's employment office. Notwithstanding the failure of Underwood to register at the hall, Port Agent Lundquist knew the specific standing of Underwood on the Seattle port list, even though no number was assigned to Underwood on that list. Lundquist frankly conceded that he might have been violating the Union's own rules by placing Underwood's name on the list, since the latter had not registered. Underwood was thereby afforded shipping privileges and his status on the list, as of October 9, 1950, was thereafter preserved intact. It was on the latter date that Underwood "first notified me (Lundquist) he was available, even though he had not complied with the requirements and registered" (Original Reporter's Transcript of Record, 550-551). Lundquist also stated that he waived the need for registration by non-union members including Underwood, and he placed them on the Seattle port list. Their failure to register by filling out an application form, is the reason why they could not be on the national lists, for the registration slips usually made out

in triplicate with one copy going to union headquarters, were not available by reason of such refusal to register (Original Reporter's Transcript of Record, 552).

Port Agent Miller, Lundquist's predecessor, concluded from Underwood's resignation as a member of the Union that he did not want to ship through the Union employment office. When Lundquist took over as Port Agent, in September 1950, he had the same understanding. The Union first became aware of Underwood's contrary intent when he wrote to the Company that he apparently did want to utilize the Union's employment office (however, minus the requirement of filing a written job application or registering). The Union then contacted Underwood to refer him to a job. The offer was unavailing, for Underwood's daughter informed Miller that the former was working in Alaska (R. 181, 254). The reason Underwood's name could not appear on the national lists, was the result of Underwood's refusal to register at all (R. 195, 200-201). When the cannery job in Kake, Alaska, ended on October 9, 1950, Underwood was required to, but refused, to register for employment. This was the same procedure required of all others who were in an unemployed status, whether they were union or non-union men (R. 221, 247). The record is clear that if Underwood had re-registered sometime after June 1950, when the new Union shipping rules became effective, his name would have appeared on the National job assignment lists (R. 252).

Another explanation by Lundquist as to the reason why the non-union radio officers assigned between June 29, 1950 and February 17, 1951 (Union Ex. 25) were not on the National lists, was that during the Korean war there was a shortage of available radio officers, both union and non-union men. Therefore, those who did register in the branch offices were given jobs within the same week of registration, and therefore, by the system followed in reporting to the National office each week, a registrant who is assigned to a job in the same week of his registration for work, whether he be a union member or not, is not reported to the National office (Original Reporter's Transcript of Record, 552, 555-559).

As to the inclusion of Underwood on the Seattle branch lists: When Lundquist learned from Underwood that he was back from his cannery job in Alaska and was available for a permanent job only with the Company, Lundquist placed his name on the list (Union Ex. 7). He was thereafter carried week by week on the lists and would have been assigned if the type of job he wanted was available. When, in December 1950, Underwood first indicated to Lundquist that he was available for a *temporary* job in addition to his previous request for only a permanent job with the Company, that change in status was recorded on the port list (Union Ex. 8). In evidence, as Union Exs. 9 to 19, inclusive, are the weekly Seattle port lists from the first week in January 1951, to the week immediately prior to the hearing held in this case. There too, Underwood's status for availability for assignment to

the type of job which Underwood wanted, was recorded. On the six occasions evidenced by Union Exs. 20-25, when jobs were available to which Underwood might have been assigned, Lundquist explained the circumstances which prevented such assignments. His testimony is uncontradicted and was credited by the Board (R. 204-216). When Underwood indicated his availability for the type of job which he had previously refused to take and when he was actually on hand to accept the job, he was immediately dispatched (R. 203). This, despite the fact that Underwood had not previously registered as required by the "new" shipping rules and the practice in the Seattle port.

B. Underwood Would Rather Collect Unemployment Insurance Than Work.

Underwood's desire to collect unemployment insurance instead of working was the basis of his difficulty when he refused to stand by the COASTAL RAMBLER, operated by the Company (R. 164-165). Apparently easy money without the need to work was a matter of greater interest to Underwood than the acceptance of a proffered job. The Union referred him to a job on a vessel going to Honolulu, sometime after he had resigned as a member, but since he was then collecting unemployment insurance benefits, it would mean that he would have to forego such further benefits by accepting the job. He chose to refuse the job and to remain idle at the same time collecting unemployment insurance (R. 139).

His difficulty with the lay-up of the COASTAL RAMBLER was of a similar nature. At R. 164-165, Underwood testified that he thought that the COASTAL RAMBLER would "lay up" for thirty days. In the same breath he indicated that it would take at least thirty days to obtain his unemployment insurance benefits. Yet he chose to collect the latter, rather than to stand by in the protection of the permanent job which he had aboard the COASTAL RAMBLER. Having elected to do so, he necessarily had to abandon his permanent job rights aboard the COASTAL RAMBLER,—proof again that his interest is primarily in the collection of unemployment insurance, rather than to "stand by" in the protection of a permanent job.

It is appropriate to observe that Underwood created his own difficulties. He misjudged the period of the lay-up of the COASTAL RAMBLER. He thought it would lay up for a longer period than is covered by the unemployment insurance payment period, but he guessed wrong. As already shown in this brief, this incident was the trigger point for all of Underwood's pent-up emotions and difficulties with himself, rather than with the Company or the Union (R. 163).

C. The Board's Conjectures as to the Relative Numerical Standing of Deyo and Underwood as of January 7, 1950.

The Trial Examiner engaged in mental gymnastics in straining a construction to lead to a conclusion that Underwood had a lower number than Deyo as of January 7, 1950. Based upon this misconception the Trial

Examiner found that a failure to refer Underwood to the S/S ALASKA on May 5, 1950 was discrimination. There were only two of the weekly assignment lists offered in evidence (Union Exs. 28 and 29). One was dated December 31, 1949 (Union Ex. 28), and the other was dated March 10, 1951 (Union Ex. 29). They were merely introduced as sample lists, for they all are quite bulky. (Each list contains about 20 pages.) It would have been unnecessarily burdensome to submit all of the assignment lists from December 1949 to March 1951. The December 31, 1949 list was selected because it was illustrative of the method of listing for job vacancies for members of the Union, while Underwood was still a member. The March 10, 1951 assignment list was presented to illustrate the method of listing all radio officers, union and non-union men alike, on the very latest list, contemporaneous with the holding of the hearings before the Board in March 1951. There is no justification for the Trial Examiner's conclusion that the number of Deyo was other than 793 on the January 7, 1950 list, as compared with 796 as Underwood's position on the same list. Lundquist very frankly indicated that because he had prepared Union's Ex. 27, which showed the chronology of assignments of radio officers to Alaska Steamship Company vessels between December 1, 1949 and the middle of February 1951 (the latter date being just shortly before the hearings commenced), a long time before the commencement of the hearings, he did not recall the significance of the line drawn through the figure 793 opposite Deyo's name on Union's Ex. 27,

and the meaning of the figure 815 appearing above the crossed-out figure of 793. Lundquist's testimony was credited by the Board in *all other* material respects. Lundquist testified that the relative standing of Deyo was 793 and that of Underwood was 796 on January 7, 1950. There is therefore no foundation for the conjecture, surmise and guess which the Trial Examiner necessarily had to make to determine that Deyo's number was 815 and not 793 at the time Underwood's number was 796. Lundquist testified without contradiction that based upon Underwood's standing on the January 7, 1950 list Underwood could not have been assigned to any job up to November 8, 1950 (R. 230-231), which was beyond the period of May 5, 1950, when the Trial Examiner found that Deyo's assignment should have been Underwood's.

Furthermore, the Trial Examiner's conjecture that Deyo was sent ahead of Underwood and out of numerical order is based on an assumption that Underwood had an *absolute* right to such an assignment. This flies in the face of the uncontradicted testimony and the finding of the Trial Examiner, affirmed by the Board, that Underwood had restricted fully and completely the kind and type of job which he would even consider. Under the *Universal Camera* and *Pittsburgh SS. Co.* decisions, 340 U.S. 474 and 498, such conjecture flies in the face of the Supreme Court's direction to the National Labor Relations Board that a finding should only be made based upon *substantial* evidence on the record considered as a whole. There is not only a lack

of *substantial* evidence, but in fact there is no evidence at all to sustain the Board's affirmance of the Trial Examiner's surmise, guess and conjecture in this regard.

D. Back Pay, If Any, Must Be Confined to the Period Between May 5 and October 5, 1950.

Notwithstanding the fact that Underwood was a non-Union member, he was nevertheless offered jobs even after he resigned as a member of the Union (R. 59, 131-133, 220).

In all of the circumstances, the Board's order may not be enforced. Therefore, no back pay would be involved. However, if the Court should find discrimination at all, it can only find it to have existed between May 5th and October 9th, 1950. The Trial Examiner at R. 59, (affirmed by the Board), reviewed Underwood's employment history between these two dates. He found that on July 23, 1950, Underwood by his own voluntary act, removed himself from the maritime labor market in the port of Seattle, for any possible assignment to a radio officer's job. He did so by accepting employment as a radio operator in a cannery at Kake, Alaska, on July 23, 1950. He did not return until October 9, 1950. Furthermore, it has already been shown that Underwood during that time and thereafter, limited his availability to *permanent* jobs only, on vessels operated by the Company *only*, and of "short run" duration—conditions which could not be met by the employment office dispatcher, until Underwood removed such restrictions on February

27, 1951. Back pay, if any is to be assessed, must therefore be confined to the period between May 5, 1950 and October 9, 1950.

III. ARGUMENT.

BY REASON OF ERRORS OF LAW, LACK OF SUPPORT BY ANY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE, FAILURE OF SUPPORT OF ANY OF THE BOARD'S FINDINGS, THE BOARD'S ORDER SHOULD NOT BE ENFORCED.

The Union agrees with so much of the Company's brief which begins at page 15 and continues through page 36, with the exceptions hereafter noted. In the main, the analysis as to the "Conclusions of the Board", the nature of the "Order of the Board", and the "Specifications of Errors Relied Upon" at pages 15-18 of its brief, is likewise adopted by the Union, except as stated hereafter. So also with the "Argument" and the "Conclusion" at pages 18-36 of the brief submitted by the Company, with the exceptions hereafter noted.

The Union does not agree with item 5 of the Company's "Specifications of Errors" on page 17. On the contrary, the entire course of correspondence among the Company, Underwood and the Union as shown by the Record, makes it abundantly clear that the Company knew that Underwood had resigned his membership because of his twisted notion that the employment office maintained since 1935 at the union hall, operated, among other things, as a "roulette wheel".

The Union further disagrees with the contention of the Company on page 18, that the Board erred in re-

fusing to find that the Union alone should be responsible for any alleged discrimination and that the Union alone is to provide the "Remedy" set out in the Board's order.[4]

As to the portion of the Company's brief under the section of "Argument", pages 19, et seq. The Union excepts to the Company's statement in the third paragraph that the removal of Underwood's name from the Union's lists in January 1950 was without the knowledge of the Company, for which the Company may not be held in the event that this Court should sustain the Board's order.

The reference to Underwood's resignation from the Union in December 1950 (Company's brief top of page 21) should be December 1949.

On page 23 of the Company's brief, last paragraph, the Union is in general agreement with its content, except insofar as there is an implication that there was any need for the Company to ask Underwood to register at the employment office or that there was any need for the Company to request the Union to dispatch Underwood "without discrimination". There had been no discrimination in fact, nor any intent to discriminate against Underwood or anyone else. Therefore, there was no need for the Company to ask Underwood to register with the Union, nor was there any need for

[4]In discussing the potential joint liability of the Company and the Union in any order which the Court may make in this case the Union is not to be deemed to waive its position that the Board's order is wrong, and that it should not be enforced at all.

the Company to ask the Union not to "discriminate" against Underwood.

As to the last paragraph on page 24, and over to page 25, of the Company's brief—the Union is in general agreement with the views there expressed. However, the Union does emphasize that the "preferential" hiring clause condemned by the Board in a prior case (89 NLRB 894), was subsequently deleted in July 1950. The evidence is clear and implicit that in June 1950 new and indiscriminate rules for job dispatch of employed radio officers were effectuated by the Union to implement the requirements of the subsequently negotiated July 14, 1950 agreement between the PMA and the Union to dispatch unemployed radio officers "according to law" (Gen. Counsel Ex. 4, fourth paragraph).

As to page 25, and continuing for two-thirds of the page on page 26—the Union agrees. It does not agree with the general tenor of some of the implications which tend to imply any "fault" on the part of the Union.

As to the material beginning at the bottom of page 26 and through page 29 of the Company's brief, the Union is in complete disagreement with the Company. The Union does however agree with the second and third paragraphs on page 29, i.e., that the Union interpreted Underwood's letter of resignation (Union Ex. 6) to mean that he no longer desired to utilize the Union's employment offices or to ship by means of the facilities there provided. Moreover, the Union's

interpretation of Underwood's resignation in December 1949 was a most normal reaction to be expected of the Union and its officials. That Underwood himself understood his resignation to mean that he wanted no more of the Union's employment office is buttressed by his own action in applying directly to the Company for employment *even before his resignation from the Union became effective* (R. 126-129, Gen. Counsel Ex. 8).

As to all of page 30 to the middle of page 33, the Union completely disagrees. The Company asserts that a back pay order should be assessed only against the Union. Its position is wrong for the following reasons: The Record is replete with evidence that the Company knew of Underwood's claim for alleged "discrimination". As has been shown, the Union on its part did all it could, at all times, to refer Underwood to any available job. It was his refusal to register at the employment office managed by the Union which precluded the latter from assigning Underwood to a job. Underwood testified of his continued and varied correspondence with the Company putting it on notice that he claimed to have been discriminated against (R. 162). In fact, there was an undertone of a cooperative enterprise between Underwood and the Company to place the Union in an embarrassing position when the Company knew that the Union could not assign Underwood to a job with the Company in view of the operation of the employment office under the same system which has existed since 1935 (R. 163).

The law is contrary to that for which the Company contends. This Honorable Court, in *NLRB v. Pinkerton National Detective Agency,* 202 F. (2d) 230 (C.A. 9th, 1953), held both the Union and the Employer to respond to a back pay order, when discrimination was found on the part of both. An earlier case in the United States Court of Appeals for the 7th Circuit, *Union Starch & Refining Co. v. NLRB,* 186 F. (2d) 1008, is to the same effect. Congress rejected the type of remedy which the Company in this case contends for. The House Bill, H.R. 3020, 80th Cong., 1st Sess., in 1 Leg. His. 68,195, carried a provision which would have restricted a Board order to compel a choice as to the assessment of a back pay order between an Employer and a Labor Organization. It was rejected by the Conference Report (H. Conf. Rep. 510, 80th Cong., 1st Sess., 54). The principle of a *joint* assessment of a remedial back pay order, was also recognized in *NLRB v. Acme Mattress Co., Inc.,* 192 F. (2d) 524 at 528 (C.A. 7th, 1951). See also, *NLRB v. Newspaper and Mail Deliverers Union, etc.,* 192 F. (2d) 654 at 656 (C.A. 2nd, 1951).

Indeed, under all of the circumstances of this case, if back pay should be ordered as part of the Remedy in the case, the Union ought not to be included in such an order. In the *Rockaway News Supply Company* case, 94 NLRB No. 156 (1951) a Trial Examiner's recommendation that a Union be made jointly and severally liable with an Employer for any loss of pay suffered by non-union employees by reason

of discriminatory treatment accorded them, was held not to be justified, since the allegations and evidence in that case against the Union were limited to violations arising under a 1948 contract. The Board refused to hold the Union for acts of discrimination arising solely out of two earlier contracts, i.e., those of 1946 and 1947. So also in the instant case, the alleged discrimination occurred under the prior 1948 contract. It was amended in July 1950, and the Board, in the instant case found it to be a valid agreement. It also found that the application of the shipping rules under the 1950 agreement were also valid. It has been demonstrated that Underwood refused to comply with the registration provisions in the use of the Union employment office for job dispatch (R. 171, 181, 195, 200, 201, 221, 247, 252, 254; Trial Examiner's Intermediate Report, R. 56, sustained by the Board). This, and not any act of the Union was the cause of Underwood's problems, if any.

Back pay may be required of a labor organization jointly along with an employer, only where the Union is responsible for unlawful discrimination against employees. *United Electrical Workers, etc., Independent (Gardner Electric Co.),* 95 NLRB No. 47 (1951).

As to the Company's brief beginning one-third down on page 34 to the portion marked "Conclusion" on page 35, the Union is in full agreement. It is well, however, to emphasize the following as an additional reason in demonstrating that the Board is wrong in its assumption that Underwood would have elected to

"stand by" the ALASKA when the vessel laid up for the winter on October 14, 1950. It is well to observe that the root of Underwood's self-created dilemma, i.e., his refusal to stand by the COASTAL RAMBLER in August 1949, was at a time when, by his own admission, he had expected it to be tied up *for only thirty days.* He maintained then that his economic condition did not warrant a "stand by" for that length of time. Therefore, in considering the "back pay" order, it is wholly unwarranted for the Board to assume that even if Underwood had been in the vessel's employment when the S/S ALASKA tied up on October 14, 1950, *for the entire winter season,* not to resume until the following spring, that he would have waited as a stand by to the same vessel until the spring of 1951, for in 1949, he would not even stand by the COASTAL RAMBLER for thirty days only.

CONCLUSION.

The petition for enforcement should be denied. The Board's order in its entirety should be set aside. In the alternative, if the Board's order is in any respect to be enforced, it should be modified to require back pay jointly by the Company and the Union for the period of May 5, 1950 to October 14, 1950 only. In the realistic overall picture presented by this case, the Court should further modify the Board's order so as to eliminate the need for the posting of any

notices whatever, if any portion of the Board's order is enforceable.

Dated, San Francisco, California,
September 21, 1953.

Respectfully submitted,
JAY A. DARWIN,
Attorney for Respondent
American Radio Association,
CIO.

(Appendix Follows.)

Appendix.

Appendix

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: Provided, That nothing in this Act or in any other statute of the

United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice), to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) *if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.*[1]

* * * * * * *

Provided Further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * *

---

[1]The italicized portion has been eliminated by amendment since these proceedings were instituted.

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;
* * * * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;
* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;
* * * * * * *

Sec. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice,

and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * * * *

Sec. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decee enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evi-

dence on the record considered as a whole shall be conclusive. * * *

* * * * * * *

Sec. 18.[2] * * *

* * * * * * *

Sec. 18. (b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with section 3 (f), (g), and (h) and (ii) unless following an election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

[2]Section 18 was created by Public Law 189, 82d Cong., 1st sess., enacted October 22, 1951.

No. 13560

United States
Court of Appeals
For the Ninth Circuit.

Hsi's only

FONG HUNG,

Appellant,

vs.

BRUCE G. BARBER, as the District Director of the Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-14-52

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court in and for the Northern District of California, Southern Division

Habeas Corpus No. 31512

In the Matter of the Application of
FONG HUNG, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Joseph S. Hertogs on behalf of Fong Hung respectfully shows:

I.

That the said Fong Hung, the person in whose behalf this writ is applied for, is now detained and restrained of his liberty by the respondent, Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, and his officers and agents; that the said Fong Hung is now confined in the Detention Facilities of the Immigration and Naturalization Service at 630 Sansome Street, City and County of San Francisco, State of California;

II.

That no one has filed, in behalf of the said Fong Hung, a previous application for a writ of Habeas Corpus in and about the matter set forth herein to any Court;

III.

That the petitioner has been advised by the San Francisco Office of the Immigration and Naturali-

zation Service that the said Fong Hung is to be deported from the United States on May 4, 1952, and that such deportation would take effect unless this Court intervened to prevent deportation at this time;

IV.

That the said Fong Hung arrived at the Port of San Francisco, State of California, ex SS "President Wilson" on February 23, 1951; that the said Fong Hung has been detained and restrained of his liberty by the respondent in the Detention Facilities of the Immigration and Naturalization Service at all times since February 23, 1951;

V.

That subsequent to his arrival, the said Fong Hung was detained for further examination before a Board of Special Inquiry; that on a date unknown to said petitioner, the Board of Special Inquiry voted to exclude the said Fong Hung from admission to the United States; that the excluding decision of the Board of Special Inquiry has been affirmed on appeal by both the Acting Assistant Commissioner of Immigration and Naturalization and by the Board of Immigration Appeals;

VI.

That the decision of the Board of Special Inquiry which was modified and affirmed by the Assistant Commissioner of the Immigration and Naturalization Service and by the Board of Immigration Appeals is illegal and improper, and such

illegality consists in the following, among other things:

> That Section 23 of the Internal Security Act of 1950, (8 U.S.C.A. 156), which amended Section 20 of the Immigration Act of February 5, 1917, specifically provides that the administrative authority must make findings that aliens would not be subject to physical persecution if deported; that the necessity of such finding as required by the statute is basic and jurisdictional; that failure to make such a finding as required by the statute is a fundamental defect which affects the validity of the present order;

That your petitioner does not have a copy of the Board of Special Inquiry hearing or the subsequent orders of the Assistant Commissioner of the Immigration and Naturalization Service and the Board of Immigration Appeals, and therefore copies of such records are not annexed hereto;

VII.

That the said Fong Hung was inducted into the armed forces of the United States at San Francisco, California on August 26, 1942; that the said Fong Hung was honorably discharged from the armed forces of the United States at Tampa, Florida on April 10, 1943; that the said Fong Hung has filed with the respondent herein, Bruce G. Barber, District Director, an application to file a petition for naturalization as a person who served honorably in the armed forces of the United States during World War II; that such application was filed

pursuant to the provisions of Section 324A of the Nationality Act of 1940 (8 U.S.C.A. 724A); that the said Fong Hung's application to file a petition for naturalization has not been considered by the Immigration and Naturalization Service or by this Honorable Court; that it is the contention of the said Fong Hung that he is entitled to a hearing on his application for naturalization;

VIII.

That the said Bruce G. Barber and his officers and agents aforesaid threatened to transport the body of the said Fong Hung beyond the jurisdiction of this Court to a foreign country, namely China; that China is now engaged in a civil war that would endanger the life of the said Fong Hung; that the said Fong Hung, as an honorably discharged veteran of the armed forces of the United States, would suffer physical persecution if handed over to the Communists in China; and that to deport the said Fong Hung to China would be unusual and inhumane punishment contrary to the laws of the United States;

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Fong Hung from the detention and custody of the respondent, Bruce G. Barber as District Director of the Immigration and Naturalization Service, San Francisco District, City and County of San Francisco, State of California.

/s/ JOSEPH S. HERTOGS.

State of California,
City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of Fong Hung, the subject of the foregoing petition, says:

That he has read the foregoing petition, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true; that affiant is attorney for the said Fong Hung, and that the said Fong Hung cannot read English proficiently and is detained in the custody of respondent and, therefore, is unable to verify said petition, and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS.

Subscribed and sworn to before me this 1st day of May, 1952.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The United States of America.

To: Bruce G. Barber, District Director, Immigration and Naturalization Service, United States Department of Justice, 630 Sansome Street, San Francisco, California.

The petition of Joseph S. Hertogs in behalf of Fong Hung having been duly filed herein, praying that a writ of habeas corpus issue in the above-entitled matter,

It Is Hereby Ordered that you, Bruce G. Barber, District Director of the Immigration and Naturalization Service, 630 Sansome Street, City and County of San Francisco, State of California, be and appear before the undersigned Judge of the above-entitled Court on Tuesday the 20th day of May, 1952, at the hour of 10 o'clock a.m., to show cause, if any you have, why such writ should not be issued.

And the United States Marshal in and for the Northern District of California, at San Francisco, is hereby ordered and directed forthwith to serve a copy of this Order upon the said Bruce G. Barber, together with a copy of the Petition aforesaid.

Dated: San Francisco, California, this 1st day of May, 1952.

/s/ LOUIS E. GOODMAN,
Judge of the District Court.

[Endorsed]: Filed May 1, 1952.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now, Bruce G. Barber, District Director, United States Immigration and Naturalization Service of San Francisco, California, hereinafter referred to as respondent, to show cause why writ of habeas corpus should not be issued, admits, denies and alleges as follows:

I.

Respondent admits the allegations contained in paragraph I of the petition for writ of habeas corpus.

II.

Respondent admits the allegations contained in paragraph II of the petition for writ of habeas corpus.

III.

Respondent admits the allegations contained in paragraph III of the petition for writ of habeas corpus, except that upon the filing of said petition, the petitioner's deportation was temporarily stayed.

IV.

Respondent admits the allegations contained in Paragraph IV of the petition for writ of habeas corpus.

V.

Respondent admits the allegations contained in Paragraph V of the petition for writ of habeas corpus, and in support thereof the certified record

of the Immigration and Naturalization Service, marked Exhibit "A," is attached hereto and made a part of the Return to Order to Show Cause.

VI.

Respondent denies the allegations contained in Paragraph VI of the petition for writ of habeas corpus. A copy of the Board of Special Inquiry Hearing, the Order of the Assistant Commissioner of Immigration and Naturalization Service, and the Order of the Board of Immigration Appeals are contained in respondent's Exhibit "A."

VII.

Respondent admits the allegations contained in Paragraph VII of the petition for writ of habeas corpus, but specifically denies that the petitioner is entitled to a hearing on his application for naturalization.

VIII.

Respondent admits that it is his intention to deport Fong Hung to a foreign country, but denies that such foreign country is China. Respondent affirmatively asserts that it is his intention to deport Fong Hung to the British Crown Colony of Hong Kong, the country from which the petitioner came and in which petitioner's family now resides. Respondent further denies that there is any intention to hand the petitioner over to the Communists in China.

TRUE CAUSE OF DETENTION

Petitioner arrived at the Port of San Francisco, State of California, on February 23, 1951. Petitioner was accorded a hearing before a Board of Special Inquiry, in accordance with 8 U.S.C.A. 153, and the regulations made thereunder. The Board of Special Inquiry found the petitioner inadmissible to the United States on the following grounds:

> "1. He is an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;
>
> "2. He does not present an unexpired passport or official document in the nature of a passport issued by the government of the country to which he owes allegiance or other travel document showing his origin and identity;
>
> "3. He admits having committed a felony or other crime or misdemeanor involving moral turpitude, to wit: perjury."

The decision of the Board of Special Inquiry was affirmed by the Commissioner of Immigration and Naturalization. Thereafter, the petitioner appealed to the Board of Immigration Appeals, and on September 25, 1951, the Board of Immigration Appeals dismissed petitioner's appeal from the Commissioner's decision. The petitioner then obtained the services of Attorney Boyd H. Reynolds, who filed with the Board of Immigration Appeals, on petitioner's behalf, a motion to reopen the Board hearing.

The Board of Immigration Appeals denied the motion under date of January 30, 1952. The petitioner, through counsel, then contacted two members of Congress in an effort to obtain a private bill. After being advised as to the facts set forth in the Immigration records, the congressmen denied the request.

Under the provisions of 8 U.S.C.A. 154 (Section 18 Immigration Act of 1917) arrangements were made to deport the petitioner to the British Crown Colony of Hong Kong. Upon the filing of the present petition for writ of habeas corpus, the intended deportation was temporarily stayed.

Wherefore, respondent prays that the order to show cause be discharged.

Dated: May 13, 1952.

/s/ BRUCE G. BARBER,
District Director.

[Endorsed]: Filed May 14, 1952.

[Title of District Court and Cause.]

TRAVERSE TO THE RETURN TO ORDER TO SHOW CAUSE

Comes Now the petitioner, by his attorney, Joseph S. Hertogs, and makes this Traverse to the return to order to show cause, and states as follows:

I.

With reference to paragraph 6 of said return, petitioner alleges that the decision of the Board of

Special Inquiry and the order of the Assistant Commissioner of the Immigration and Naturalization Service and the order of the Board of Immigration Appeals, which are marked as respondent's exhibit "A" are illegal and improper, inasmuch as they do not comply with the Immigration statutes which require that the administrative authority make a specific finding concerning physical persecution.

II.

In answer to paragraph 7 of said return, petitioner alleges that as an honorably discharged member of the armed forces of the United States who served during World War II he is entitled to a hearing on his application for naturalization.

III.

With reference to paragraph 8 of said return, petitioner affirmatively asserts that it is the intention of the respondent to deport the petitioner to Communist China.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Fong Hung from the detention and custody of the respondent, Bruce G. Barber as District Director of the Immigration and Naturalization Service, San Francisco District, City and County of San Francisco, State of California.

/s/ JOSEPH S. HERTOGS.

State of California,
City and County of San Francisco—ss.

Joseph S. Hertogs, being first duly sworn, on behalf of Fong Hung, the subject of the foregoing, says:

That he has read the foregoing Traverse, and knows the contents thereof, and that the facts therein alleged are within his knowledge and that the same is true, except as to the matters therein stated upon information or belief, and as to those matters that he believes it to be true; that affiant is attorney for the said Fong Hung, and that the said Fong Hung cannot read English proficiently and is detained in the custody of respondent and, therefore, is unable to verify said Traverse, and that affiant, therefore, makes this affidavit.

/s/ JOSEPH S. HERTOGS.

Subscribed and sworn to before me this 20th day of May, 1952.

[Seal] /s/ L. RUTH WILBUR,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 20, 1952.

In the United States District Court, for the Northern District of California, Southern Division

No. 31512

FONG HUNG,

Petitioner,

vs.

BRUCE G. BARBER, as District Director of the Immigration and Naturalization Service, for the Northern District of California,

Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On May 1, 1952, the petition for writ of habeas corpus was filed herein. Order to show cause why the petition should not be granted was issued, returnable May 20, 1952. Hearing was had on May 20, 1952, upon the petition, respondent's return to the petition and petitioner's traverse to the return. Upon conclusion of the hearing, the Court orally announced its decision denying the petition without prejudice. No written order was filed.

On July 31, 1952, petitioner orally moved for reconsideration. After hearing both sides, the court concludes that the petitioner's detention is lawful and that no grounds for rehearing exist.[1]

---

[1]Petitioner cites the cases of Ng Lin Chong and Wong Lai King v. McGrath, Court of Appeals D.C. #11183 and #11217, decided July 3, 1952, not yet reported. These cases, in my opinion, are not here apropos, and, in any event, I do not believe they should be followed.

Wherefore it is Ordered that the petition for writ of habeas corpus be and the same is hereby denied.

Dated: August 1, 1952.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 1, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court and to Defendant and to Chauncey Tramutolo and Edgar R. Bonsall, His Attorneys.

Take notice that the petitioner in the above-entitled cause hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the Honorable Louis E. Goodman, United States District Judge in the Southern Division of the United States District Court for the Northern District of California denying the petition for a writ of habeas corpus, said order dated August 1, 1952.

Dated this 4th day of August, 1952.

/s/ JOSEPH S. HERTOGS.

[Endorsed]: Filed August 7, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled matter, and that they constitute the record on appeal as designated by the attorneys for the appellant herein:

Petition for writ of habeas corpus.

Order to show cause.

Return to order to show cause.

Traverse to the return to order to show cause.

Order denying petition for writ of habeas corpus.

Notice of appeal.

Statement of points on which appellant intends to rely on appeal.

Order extending time to docket record on appeal.

Designation of contents of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of September, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13560. United States Court of Appeals for the Ninth Circuit. Fong Hung, Appellant, vs. Bruce G. Barber, as the District Director of the Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 30, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13560

FONG HUNG,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THE ABOVE-ENTITLED MATTER

Comes Now, Fong Hung, by and through his attorney, Joseph S. Hertogs, files herein the Statement of Points on which appellant intends to rely in the appeal of the above-entitled matter:

I.

That the District Court erred in holding that the appellant was given a fair hearing as required by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

II.

The District Court erred in holding and deciding that Section 156, Title 8, United States Code Annotated, as amended by the Act of September 23, 1950, was not applicable (Act of Feb. 5, 1917, 39 Stat. 887; 64 Stat. 1010).

III.

The District Court erred in holding and deciding that the appellee complied with Section 156, Title 8, United States Code Annotated, as amended by the Act of September 23, 1950 (Act of Feb. 5, 1917, 39 Stat. 887; 64 Stat. 1010).

IV.

The District Court erred in holding that the petitioner was not entitled to the benefit of Section 724(a) of Title 8, United States Code Annotated.

V.

That the District Court erred in holding and deciding that the petitioner was lawfully restrained of his liberty by the appellee under a valid warrant of deportation.

Dated: October 4, 1952.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed October 3, 1952.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between counsel for appellant and counsel for appellee that the exhibits, consisting of Immigration and Naturalization Service files, which were attached to and made a part of the Return to Order to Show Cause may be considered in their original form without printing.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

By /s/ EDGAR R. BONSALL,
Asst. United States Attorney.

/s/ ALBERT LEE STEVENS,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed October 7, 1952.

No. 13562

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING CO., a Corporation,

Appellees.

Apostles on Appeal
In Two Volumes
Volume I
(Pages 1 to 359)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-30-53

No. 13562

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING CO., a Corporation,

Appellees.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney.

KEITH R. FERGUSON, ESQ.,
Special Assistant to the Attorney General.

J. STEWART HARRISON,
Attorney, Department of Justice,
San Francisco, California,

Attorneys for Appellant.

HERBERT RESNER, ESQ.,
RAOUL D. MAGANA, ESQ.,
458 South Spring St.,
Los Angeles 13, Calif.

JOHN H. BLACK, ESQ.,
EDWARD R. KAY, ESQ.,
233 Sansome St.,
San Francisco 4, Calif.

Attorneys for Appellees.

In the United States District Court for the Southern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN PACIFIC STEAMSHIP CO., a Corporation,

Respondents.

AMENDED LIBEL IN PERSONAM FOR DAMAGES

(Personal Injuries)

To the Honorable, the Judges of the United States District Court, in and for the Northern District of California, Southern Division:

The libel of Frank Luehr against the United States of America and the American Pacific Steamship Co., a corporation, in a cause of damages for personal injuries, civil and maritime, alleges:

I.

Libelant now is, and during all the times herein mentioned was, a resident of the County of Alameda, and resident within the jurisdiction of the above-entitled Court.

II.

During all the time herein mentioned respondent United States of America owned and both respondents maintained, operated, navigated, managed and controlled the U. S. N. S. "Shawnee Trail" as a

tankship in interstate and foreign commerce. That said vessel either is now, soon will come, and recently has been within this district.

III.

Libelant brings and maintains this libel under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, § 2; 41 Stat. 525; 46 U.S.C. SS 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, § 1, 43 Stat. 112, 46 U.S.C. §781-790), and the General Maritime Law and by virtue thereof, the Court has jurisdiction of the parties and the subject matter.

IV.

That on or about July 28, 1950, at or about the hour of 12:45 p.m., the said U.S.N.S. "Shawnee Trail" was docked at the Port of Alameda, California, at Army Transit Depot No. 3, and was on navigable waters of the United States, namely San Francisco Bay.

V.

At said time and place respondent United States of America owned a certain barge and floating crane, which vessel and crane was operated, managed, maintained and controlled by the United States Army, its personnel and civilian employees.

VI.

At said time and place libelant was in the employ of the Jones Stevedoring Company as a longshoreman and was working aboard the said "Shawnee Trail" in the usual course and scope of his employment and was a busines invitee of the respondents.

VII.

At said time and place libelant was working on the mecano deck of said "Shawnee Trail," helping to load cargo and airplanes aboard said vessel. At said time and place respondents so negligently and carelessly managed, operated, maintained and controlled the aforesaid "Shawnee Trail" and floating barge and crane, and so negligently and carelessly, themselves and through their personnel and employees, loaded cargo and particularly an airplane aboard said "Shawnee Trail" that they did cause said cargo and airplane to fall from the hoist by which it was being loaded and it did fall upon libelant, causing him grievous and severe personal injuries as hereinafter described.

VIII.

That the said U.S.N.S. "Shawnee Trail" and floating barge and crane were in an unseaworthy, unsafe and improper condition and were navigated, maintained, managed, operated and controlled in an unseaworthy manner, and the personnel and employees of respondents and respondents themselves committed various unseaworthy acts in loading said cargo and airplane, and as a direct and proximate result there of said cargo and airplane was caused to and did fall upon libelant, causing him grievous and severe personal injuries as hereinafter described.

IX.

That respondent American Pacific Steamship Company failed to furnish libelant with a safe,

proper and seaworthy place in and about which to work, in that said airplane and cargo were being loaded upon what is known as a mecano deck, a deck fabricated above the main deck, and there was no safe, proper, or seaworthy place for libelant to stand and work, but he was required to stand on said mecano deck in a place of danger, and was in such a place of danger and could not escape therefrom when said airplane fell upon him.

X.

That as a direct and proximate result of the negligence and carelessness of respondents, their agents, personnel and employees, and of the unseaworthiness of said U.S.N.S. "Shawnee Trail" and said floating barge and crane, and the unseaworthy acts of respondents and their employees and personnel, and of said cargo and airplane falling upon libelant, the libelant was caused to and he did suffer and incur grievous and severe personal injuries as follows:

1. Compound fractures of the left leg and the tibia and fibula thereof, and injuries to the bones, nerves, joints and muscles of the left leg; osteomyelitis of said leg;

2. Fractures of the left third, fourth, fifth and sixth ribs;

3. Compression fracture with displacement of the first lumbar vertebrae; injury to the spine.

4. Fracture of the left clavicle;

5. Brain concussion;

6. Severe internal injuries;

7. Injuries to other parts of libelant's head and body, the exact nature of which he does not know and prays leave to amend his libel and insert a full description thereof when ascertained, or offer proof thereof at the trial herein.

XI.

Libelant was hospitalized on various occasions and required to have blood transfusions, skin grafting of the left leg, many operations for the removal of dead bone from said leg, and other treatment and attention.

Said injuries caused libelant grievous and severe physical and mental pain and suffering, and he is informed and believes and alleges that the injuries to his body described above are permanent in character and that libelant will not ever be able to resume his work as a longshoreman, or any gainful occupation. Said injuries have caused libelant general damages in the amount of $200,000.00.

XII.

Libelant has incurred medical expenses on account of said injuries and will incur further medical treatment and attention. That said expenses for medical attention have and will cause libelant special damage in the amount of $35,000.00.

XIII.

Libelant was gainfully employed as a longshoreman at the time of the aforesaid accident and was earning wages of approximately $100.00 per week. At the time hereof he has suffered loss of wages to

his special damage in the amount of approximately $7,200.00. Libelant will be unable to resume any gainful occupation in the future and will suffer future wage loss to his special damage, and prays leave to amend his libel or to offer proof at the time of trial of the wage loss which libelant has sustained or which he is likely to sustain in the future.

XIV.

All and singular the allegations are true and are within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that pursuant to the statutes made and provided in cases like the instant one that respondents be cited to appear and answer to the libel herein that process issue against respondent American Pacific Steamship Co., and that libelant have decree and judgment against respondents for the sum of $242,200.00, plus future wage loss and medical expenses, costs of suit herein, and such other and further relief as is meet and just in the premises.

Dated: January 22, 1952.

/s/ HERBERT RESNER,

/s/ RAOUL D. MAGANA,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, respondent above named, and for answer to the libel of Frank Luehr in personam for damages for personal injuries, admits, denies, and alleges as follows:

I.

Answering unto Article I of said libel, respondent admits the allegation contained therein.

II.

Answering unto Article II of said libel respondent admits the allegation contained therein.

III.

Answering unto Article III of said libel, respondent leaves matters of jurisdiction to the Court.

IV.

Answering unto Article IV of said libel respondent admits the allegation contained therein.

V.

Answering unto Article V of said libel respondent admits ownership of a certain barge and floating crane, but denies that said vessels were operated, managed and controlled by the United States Army, its personnel and civilian employees.

VI.

Answering unto Article V of said libel respondent admits the allegations contained therein.

VII.

Answering unto Article VII of said libel respondent admits that libelant was working on the deck of said U.S.N.S. Shawnee Trail helping load cargo aboard said vessel, but denies each and every, all and singular, the remaining allegations of said Article VII.

VIII.

Answering unto Article VIII of said libel respondent denies each and every, all and singular, the allegations contained therein.

IX.

Answering unto Article IX of said libel respondent denies each and every, all and singular, the allegations contained therein.

X.

Answering unto Article X of said libel respondent alleges that it has not sufficient information or belief to properly answer said allegations, and on said ground denies each and every, all and singular, the allegations therein contained and requires strict proof thereof insofar as material.

XI.

Answering unto Article XI of said libel respondent alleges that it has not sufficient information or belief to properly answer said allegations, and on said ground denies each and every, all and singular, the allegations therein contained and requires strict proof thereof insofar as material.

XII.

Answering unto Article XIII of said libel, respondent denies that all and singular the allegations are true, and leaves the matter of jurisdiction to the Court.

Further Answering Unto Said Libel, and for a First, Separate and Distinct Defense to Said Libel Respondent Alleges as Follows:

XIV.

That any injury to, or damages suffered by libelant were sustained solely by libelant's own negligence in failing to use due or any care for his own safety in the performance of his duties, and/or by the negligence of libelant's employer, Jones Stevedoring Company. Respondent alleges that such damages and injuries, if any there were, were not caused or contributed to in any manner by any fault or negligence of respondent, its servants, agents, or respresentatives, or by any unseaworthiness of any of said vessels.

Further Answering Unto Said Libel, and for a Second, Separate, and Distinct Defense to Said Libel, Respondent Alleges as Follows:

XV.

Respondent alleges that at the time and place in said libel set forth, libelant was solely an employee of Jones Stevedoring Company, an independent contractor, and was working in the course and scope of his employment aboard said U.S.N.S. Shawnee

Trail as a stevedore; that the damages claimed by libelant were not caused by said vessel or any other vessel owned by the respondent, but, on the contrary, were solely caused by the carelessness and negligence of libelant himself, and/or the carelessness and negligence of libelant's said employer; and that the cause of action stated by said libel is not one respecting which the United States has consented to be sued under the Suits in Admiralty Act, or the Public Vessels Act, or under any other statute or provision of law whatsoever.

Wherefore, respondent prays that the libel may be dismissed with costs.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney.

By /s/ R. B. McMILLAN,
Asst. U. S. Atty.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of
Justice.

[Endorsed]: Filed May 31, 1951.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

JONES STEVEDORING COMPANY, a Corporation,

Respondent-impleaded.

PETITION TO BRING IN THIRD PARTY UNDER RULE 56

To the Honorable, the Judges of the Above-Entitled Court, Sitting in Admiralty:

The petition of the United States of America, respondent herein, respectfully shows:

I.

Upon information and belief that at all times hereinafter mentioned the Jones Stevedoring Company, a corporation, (hereinafter called "said company"), was and now is a corporation, organized and existing under the laws of the State of California and has a principal place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

II.

That on or about February 23, 1951, Frank Luehr filed a Libel in Personam for damages herein against Petitioner, the United States of America, wherein libelant claims the sum of $238,000.00, together with special damages, for personal injuries. A copy of said libel is hereto attached, marked "Exhibit A" and, by reference, is made a part hereof;

III.

That on or about January 1, 1950, said company entered into a written contract with Petitioner, the United States of America, whereby said company, referred to in said contract as "the contractor," agreed to load or discharge cargoes and, in connection therewith, to perform all the duties of a stevedore on any vessel which the contracting officer might designate. That under the terms of said contract and in connection with the performance thereof, said company agreed in part in terms as follows:

"Article 1. General Scope of the Contract.

"(b) Contractor's Duties. (1) In loading vessel, the contractor shall remove and handle cargo from open-top railroad cars, trucks, alongside ship, also from barges, lighters, scows and cars on car floats alongside ship, in pier sheds and place of rest on pier. The contractor shall stow said cargo in any space in the vessel, including bunker space, decks, 'tween decks, on deck, fore and aft peaks, and deep tanks, in order directed by and in a manner satis-

factory to the contracting officer, the master of the vessel or his representative."

"(h) Gear Supplied by Government. (1) The Government, at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the contracting officer, the ship's equipment can be used satisfactorily."

"Article 14. Liability and Insurance.

"(a) The Contractor.

"(1) shall be liable to the Government for any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

"(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

"(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

"(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished

by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

"(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific directions of the contracting officer."

IV.

That said contract was at all times material herein, in full force and effect, said contract being designated DA 04-197; TC-246; that at the time of the alleged occurrence of injuries described in the libel, said company was engaged in loading airplanes aboard the U.S.N.S. Shawnee Trail through the use of a derrick barge (BD-3031) owned by the respondent, but loaned to said company pursuant to and under the terms of said contract.

V.

Petitioner further alleges on information and belief, that libelant was injured while performing work aboard said vessel in the course of his employment by said company, in its performance of the said contract; that any injuries sustained by libel-

ant were solely and directly, and proximately caused by the carelessness and negligence of said company, its servants (or borrowed servants) agents, and employees.

VI.

That if petitioner is under any liability by reason of any of the matters alleged in said libel, such liability was solely and proximately caused by the fault and negligence of said company, its servants, agents or employees, in respect to the matters in Article V hereof set forth; by reason thereof any and all such liability should be borne by said company and not by petitioner, and that said company is wholly or partially liable to petition by way of indemnity or contribution, or other remedy over or otherwise, and that said company should be proceeded against by libelant directly and in place and stead of this petitioner.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, petitioner prays:

1. That process in due form of law may issue against the said Jones Stevedoring Company, citing it to appear and answer all and singular the matter of this petition and of the libel herewith exhibited.

2. That said Jones Stevedoring Company be proceeded against as if originally made a party

herein, and that if the Court shall find libelant is entitled to a decree, then that said decree be entered against said Jones Stevedoring Company, and that the Court may dismiss said libel as against the petitioner with costs.

3. That the petitioner may have such other and further relief and redress as the Court is competent to give in the premises.

/s/ CHAUNCEY F. TRAMUTOLO,
United States Attorney.

By /s/ R. B. McMILLAN,
Asst. U. S. Atty.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondent.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

ANSWER TO PETITION AND LIBEL

Comes now Jones Stevedoring Company, a corporation, respondent-impleaded herein, and answering the petition and libel herein, alleges as follows:

As to the Petition of United States of America:

I.

Admits the allegations of Paragraph I.

II.

Answering the allegations of Paragraph II, admits that on February 23, 1951, libelant herein filed a libel for damages against the United States of America, claiming certain damages for personal injuries. Said Paragraph II by reference makes the libel a part of said petition and respondent-impleaded hereinafter will answer each and every, all and singular, the allegations of the libel.

III.

Answering the allegations of Paragraph III, admits that on or about January 1, 1950, respondent-impleaded entered into a written contract for stevedoring services with respondent, United States of America. Admits that said contract provides in part as alleged in the petition of respondent, United States of America, beginning with the words "Article 1," line 15, at page 2, to and including the words "Contracting Officer," at line 15 of page 3 of respondent's petition.

Alleges that said contract further provides in part under Article 1 (b) (2) that respondent-impleaded, designated in the contract as "Contractor," shall do work on vessels wherever designated by respondent, United States of America, and also on "the order directed by, and in a manner satisfactory to, the Contracting Officer or his rep-

resentative," said Contracting Officer being designated under the contract as the representative of the United States of America.

Alleges that said contract further provides under Article 1:

"(h)1. Gear Supplied by Government. The Government, at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the Contracting Officer, the ship's equipment can be used satisfactorily.

"(h)2. The Government, at its own expense, will furnish and maintain in good working order the following: Masts, booms, blocks, preventers and gantlines rigged on booms; wire/or rope falls, rigged; winches, complete with necessary power and steam; lights on wharves and vessels."

That pursuant to the foregoing provision of the contract, respondent, United States of America, through its Contracting Officer determined that the equipment of the U.S.N.S. Shawnee Trail was not satisfactory for the purpose of taking aboard government owned cargo, namely, airplanes and, therefore, provided and used a floating derrick and crane which was exclusively owned, navigated, operated, managed and controlled by workers who were at all times herein mentioned solely and exclusively in the employ of respondent, United States of America, subject only to its direction and control.

Alleges that said contract further provides under Article 1 (n)(2) as follows:

"Cargo stowed on deck shall be secured to the satisfaction of the contracting officer and the master of the vessel or his representative. Such securing will be at the expense of the Government and the contractor (respondent-impleaded) will be compensated therefor at the extra labor rates set forth in Article 2, Schedule II."

Alleges that it is further provided in said contract as follows:

"Article 2. Schedule of Rates

"Stevedoring Services—

"Schedule of Commodity Rates

"Commodity Tonnage Rates. The Contractor will be compensated at the commodity rates listed herein which rates are based on straight-time rates of pay only. The ship's gear rates are based on normal operation involving use of ship's gear. The application of derrick rates are based upon the use of floating derricks or shore cranes for the purpose of expedient handling of cargo.

Per Ton 2240 Pounds or 40 Cubic Feet (Whichever Shall Produce the Greater Tonnage)

	Loading WT or MT		Discharging WT or MT	
	Ship's Gear	Derrick	Ship's Gear	Derrick
1. Vehicles, Airplanes (fuselage)				
Boxed.....	.89	.76	.68	.54
Unboxed ..	.71	.67	.59	.47

"An Airplane (fuselage) shall be considered as being not in excess of 150 manifest tons, even though it exceeds that figure."

Alleges that under said Article 2 of the contract that in addition to the foregoing item, there are twelve further items under said schedule of rates in which the rate per ton payable to the Contractor (respondent-impleaded) on operations involving a floating derrick are specified on a lower basis than for use of ship's gear. That pursuant to the foregoing provisions, the work done by respondent-impleaded at the time of the injuries alleged in the libel involved loading unboxed airplanes for which respondent, United States of America, paid respondent-impleaded at the rate of 67c per ton by reason of the fact that said work involved the use of a floating derrick which was then and there owned, provided and exclusively operated and controlled by respondent, United States of America.

Alleges that said Contract further provides as follows:

"Article 10. Employees of Contractor. All employees of the Contractor employed in performance of work under this contract shall be employees of the Contractor at all times and not of the Government. The Contractor shall comply with the Social Security Act, the Longshoremen's and Harbor Worker's Compensation Act, and such Workmen's Compensation Laws and Unemployment Insurance Laws of the State where the work is performed as shall be applicable to work performed hereunder and the Contractor shall comply with all other relevant legislation, State and Federal.

"Article 11. Removal of Employees of Contractor. Contracting Officer (respondent, United

States of America) may require that the Contractor (respondent-impleaded, Jones Stevedoring Company) remove such employees as the Contracting Officer deems incompetent, careless, insubordinate or otherwise objectionable and whose continued employment with respect to the services to be performed under this contract is deemed by the Contracting Officer to be contrary to the public interest."

Denies each and every, all and singular, the remaining allegations contained in Paragraph III.

IV.

Admits that said contract was at all times mentioned herein in full force and effect, said contract being designated DA 04-197; TC-24; and that at the time of the alleged occurrence of injuries described in the libel, respondent-impleaded, pursuant to said contract and at the specific direction of respondent, United States of America, provided and had brought aboard the U.S.N.S Shawnee Trail certain of its employees, including libelant, Frank Luehr, for the purpose of guiding into place on the deck of said U.S.N.S. Shawnee Trail certain airplanes which were cargo owned by respondent, United States of America.

Alleges that said airplanes were being hoisted aboard U.S.N.S. Shawnee Trail by means of a derrick crane attached to Derrick Barge BD-3031 which was exclusively owned, controlled, navigated, managed and operated by said respondent, United States of America, and that at the time of the

alleged occurrence of injuries described in the libel, an airplane owned by respondent, United States of America, was being hoisted aboard the U.S.N.S. Shawnee Trail by means of the crane attached to and a part of the said derrick barge, which was then and there being operated solely and exclusively by an employee of respondent, United States of America. Specifically denies that said derrick barge was loaned by respondent, United States of America, to respondent-impleaded, pursuant to the terms of said contract or otherwise or at all; and alleges in this connection that the said derrick barge was at all of the times herein mentioned exclusively owned, operated, navigated, managed and controlled by respondent, United States of America, its officers, agents and employees. Denies each and every, all and singular, the remaining allegations of Paragraph IV.

V.

Answering the allegations of Paragraph V, admits that libelant was injured while performing services aboard said vessel in the course of his employment by respondent-impleaded. Denies that there was any carelessness or negligence on the part of said respondent-impleaded, its servants, agents, employees, or allegedly borrowed servants, which solely or directly, or proximately, or at all caused or contributed to the happening through which libelant alleges to have been injured.

Denies specifically that the said crane operator was its servant, agent, employee or allegedly bor-

rowed servant, and specifically denies that it exercised, attempted to exercise, or had any right to exercise any direction, control or management over said crane operator.

VI.

Answering the allegations of Paragraph VI, alleges that if there were any carelessness or negligence proximately causing libelant's injuries, such carelessness or negligence was solely that of respondent, United States of America, its servants, agents, and employees.

It is specifically denied that there was any carelessness or negligence on the part of respondent-impleaded, or that it is wholly or partially or at all liable to petitioner by way of indemnity or contribution or other remedy over or otherwise.

Denies each and every, all and singular, the remaining allegations of Paragraph VI.

VII.

Denies each and every, all and singular, the allegations of Paragraph VII, and alleges that this court is without jurisdiction to entertain the petition herein or assess any liability as against this respondent-impleaded.

As to the Libel:

I.

Admits the allegations of Paragraph I.

II.

Admits the allegations of Paragraph II.

III.

Denies that the above-entitled court has jurisdiction to entertain this cause against this respondent-impleaded, pursuant to said statutes alleged in said Paragraph III, or otherwise, or at all. Denies each and every, all and singular, the remaining allegations of Paragraph III.

IV.

Admits the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Admits the allegations of Paragraph VI.

VII.

Answering the allegations of Paragraph VII, denies upon lack of information and belief, each and every, all and singular, the allegations of Paragraph VII.

VIII.

Denies each and every, all and singular, the allegations of Paragraph VIII.

IX.

Answering the allegations of Paragraph IX, alleges that said libelant's injuries as set forth therein were not caused or contributed to by any alleged carelessness or negligence on the part of this respondent-impleaded or its agents, servants or employees.

X.

Answering the allegations of Paragraph X, admits that libelant sustained certain injuries to his body and person, the exact nature of which are presently unknown to respondent-impleaded. Denies that libelant has been damaged in the sum of $200,000.00 or in any other sum or sums, or otherwise, or at all insofar as this respondent-impleaded is concerned or charged.

XI.

Denies the allegations of Paragraph XI.

XII.

Answering the allegations of Paragraph XII, this respondent-impleaded has no belief or information as to said allegations and on that ground denies generally and specifically all of the allegations thereof.

XIII.

Denies the allegations of Paragraph XIII.

As and for a Second, Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded, Jones Stevedoring Company, alleges that at the time and place of the event wherein libelant received his injuries, said libelant was a longshoreman employed by respondent-impleaded and that the sole and exclusive remedy of libelant and of respondent, United States of America, as against this respondent-impleaded is pursuant and limited to the provisions of the Longshoremen's and

Harbor Workers' Compensation Act (33 U.S.C. 901-950).

As and for a Third Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded alleges that if there is any liability on its part to libelant or to respondent, United States of America, which is hereby specifically denied, such liability is limited to the extent of any liability respondent-impleaded may have pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-950).

As and for a Fourth Separate and Distinct Answer and Defense to Said Petition of United States of America and to the Said Libel Herein, respondent-impleaded alleges that the above court has no jurisdiction to entertain the petition herein or to assess any liability as against this respondent-impleaded.

Wherefore, respondent-impleaded prays that the petition of United States of America herein be dismissed and said petitioner take nothing by way of indemnity or contribution or other remedy over, or otherwise against this impleaded-respondent, either by the allegations of the petition or said libel attached thereto.

/s/ JOHN H. BLACK,
/s/ EDW. R. KAY,

Proctors for Jones Stevedoring Company, a Corporation, the Respondent-Impleaded.

State of California,
City and County of San Francisco—ss.

Allen H. Jones, being first duly sworn, deposes and says:

That he is an officer, to wit: Vice President of Jones Stevedoring Company, a corporation, the respondent-impleaded in the above-entitled action, and as such vice-president he is authorized to and does hereby make this verification on behalf of said corporation; that he has read the foregoing answer to petition and libel and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ ALLEN H. JONES.

Subscribed and sworn to before me this 21st day of September, 1951.

[Seal] /s/ ROBERT C. TAYLOR, JR.,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires February 15, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1951.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 4th day of December, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION FOR CONTINUANCE OF TRIAL DATE

In this case J. Stewart Harrison, Esq., appearing as proctor for the United States, made a motion for continuance of the trial date, which motion was ordered denied. Said motion denied was to continue trial date from December 10th to December 12th, 1951.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Fri-

day, the 7th day of December, in the year of our Lord one thousand nine hundred and fifty-one.

Present: the Honorable Oliver J. Carter,
District Judge.

[Title of Cause.]

ORDER DENYING EXCEPTIONS OF THE JONES STEVEDORING CO. TO THE PETITION AND TO THE LIBEL

The exceptions of the Jones Stevedoring Company to the Petition and to the Libel having been heretofore submitted, and due consideration having been thereon had, It Is Ordered that said exceptions be, and the same are hereby, denied.

[Title of District Court and Cause.]

MOTION TO ADD PARTY RESPONDENT

Comes now the Libelant herein, Frank Luehr, and pursuant to Admiralty Rule 5 of the above-entitled Court, moves to add a new party respondent herein, namely American Pacific Steamship Company, a corporation.

Said motion is made upon the ground that the said American Pacific Steamship Company, a corporation, during the times herein mentioned, was the operator of the U.S.N.S. Shawnee Trail.

Dated: January 19th, 1952.

/s/ HERBERT RESNER,
/s/ RAOUL D. MAGANA,
Proctors for Libelant.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ORDER ADDING PARTY RESPONDENT
(Admiralty Rule 5)

Good Cause Appearing to the Court Therefor,

It Is Hereby Ordered that American Pacific Steamship Company, a corporation, be added as a party respondent herein and that citation in personam issued against it.

Dated: January 23, 1952.

/s/ OLIVER J. CARTER,
Judge of the United States
District Court.

[Endorsed]: Filed January 23, 1952.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 17th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 17, 1952

This case came on regularly this day for trial before the Court sitting without a jury.

Herbert Resner, Esq., and Raoul Magana, Esq., appearing as Proctors for Libelant. Stewart Harrison, Esq., appeared on behalf of the respondent, United States of America. James T. Cooper, Esq., appeared on behalf of the respondent, American-Pacific Steamship Company. John Black, Esq., and Edward Kay, Esq., appeared on behalf of the respondent, Jones Stevedoring Company.

Opening statements were made by the respective proctors on behalf of their various clients.

Marlyn Osborn and Masako Abe were sworn and testified as to hospital records, on behalf of libelant. Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits 1 to 15, inclusive.

Ted Spirz and Lester R. Paul were sworn and testified on behalf of libelant.

James B. Waters was sworn and testified on behalf of the 3rd Party Respondent, Jones Stevedoring Company. Said Jones Stevedoring Company introduced in evidence and filed a certain exhibit which was marked No. A-1-J.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 18, 1952.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL — ORDER DENYING LIBELANT'S MOTION TO DISMISS AS TO AMERICAN-PACIFIC S. S. CO., WITHOUT PREJUDICE

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Ted Spirz was recalled and further testified on behalf of libelant. The respondent introduced in evidence and filed a certain exhibit which was marked Respondent's Exhibit A.

Libelant moved the Court to dismiss as to the respondent, American-Pacific S. S. Co., which motion was ordered denied, without prejudice.

Benny Johnson and Frank Padulo were sworn and testified on behalf of the respondent, United States of America.

Frank Luehr, libelant, was sworn and testified on his own behalf. Libelant introduced in evidence

and filed certain exhibits which were marked Libelant's Exhibits Nos. 16 to 20, inclusive.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 19, 1952, at 10 o'clock a.m.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Wednesday, the 19th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 19, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Frank Luehr, libelant, was recalled and further testified in his own behalf. Walter Walker was sworn and testified on behalf of libelant. Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits Nos. 3-A to 3-J, inclusive; 1-A to 1-D, inclusive; and 20 to 36, inclusive.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 20, 1952, at 10 o'clock a.m.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco on Thursday, the 20th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 20, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Keene Hauldeman, Matthew Mogan, Max Rosenstock and Fred Nystrom were sworn and testified on behalf of the respondents. The Jones Stevedoring Co., 3rd Party Respondent, introduced in evidence and filed a certain exhibit which was marked Respondent's Exhibit B-1.

Libelant introduced in evidence and filed a certain exhibit which was marked Libelant's Exhibit No. 37.

The hour of adjournment having arrived, the further trial of this case was ordered continued to March 21, 1952, at 10 o'clock a.m.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Friday, the 21st day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 21, 1952

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Frank Green, Martin Ingbritsen, Fay Elzey, Daniel M. Patterson, Andrew Schmiz and Charles Lehmkehl were sworn and testified on behalf of respondent. Respondent introduced in evidence and filed certain exhibits which were marked Respondent's Exhibits B, C, D.

Libelant interrogated respondent's witness Martin Ingbritsen as Libelant's witness.

Dan Hollbrok, Walter Moore and James Bauman were sworn and testified on behalf of the Jones Stevedoring Co., 3rd Party Respondent.

Libelant introduced in evidence and filed certain exhibits which were marked Libelant's Exhibits Nos. 38 and 39.

The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to March 24, 1952, at 10 o'clock a.m.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 24th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—ORDER GRANTING LIBELANT'S MOTION TO DISMISS AS TO AMERICAN-PACIFIC S.S. CO.

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

Timothy O'Brien and Stanley C. Davis were sworn and testified on behalf of the Jones Stevedoring Co., 3rd party respondent. Thereupon said Jones Stevedoring Co., rested.

Libelant moved that the 3rd party respondent, American-Pacific S. S. Co., be dismissed, which said motion was ordered granted.

After hearing arguments by the respective proctors, and the hour of adjournment having arrived, it is ordered that the further trial of this case be continued to Tuesday, March 25, 1952, at 10 o'clock a.m.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 25th day of March, in the year of our Lord one thousand nine hundred and fifty-two.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MINUTES OF TRIAL—MARCH 25, 1952

Case Dismissed as to Jones Stevedoring Co., Without Prejudice; Judgment for $125,000 Entered in Favor of Libelant.

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

After further arguments by respective counsel, and upon motion of Mr. Kay, it is Ordered that this case be dismissed as to Jones Stevedoring Co., without prejudice. Further Ordered that judgment be entered for the libelant and against the respondent, United States of America, in the amount of One Hundred Twenty-five Thousand Dollars ($125,000.00) and costs. Findings and Judgment to be prepared by proctor for libelant.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECREE SUBMITTED BY PROCTORS FOR LIBELANT FRANK LUEHR

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libelant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation, being represented by Dorr, Cooper and Hayes and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that libelant Frank Luehr is and during all the times herein mentioned was a resident of the County of Alameda, State of California, and resident within the jurisdiction of the above-entitled Court.

II.

It is true that during all the times involved in this cause the respondent United States of America owned a certain tank ship known and designated as the USNS "Shawnee Trail," which vessel was operated by the respondent American Pacific Steamship Company pursuant to a contract between that company and United States of America, in interstate and foreign commerce.

III.

It is true that libelant brought and maintained the amended libel herein under the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

IV.

It is true that on July 28, 1950, in the forenoon, the said USNS "Shawnee Trail" was docked at the port of Alameda, California, at Army Transit Depot No. 3, and was afloat on navigable waters of the United States.

V.

It is true that at all times mentioned in said amended libel respondent United States of America owned a certain barge and floating crane designated as Army Barge BD 3031, which barge and crane were then and there, and at all times material herein, operated, managed, maintained and controlled exclusively by United States of America,

acting through the United States Army, its personnel and civilian employees.

VI.

It is true that at the times mentioned in said amended libel, libelant was in the employ of Jones Stevedoring Company as a longshoreman, and was then and there necessarily working aboard said USNS "Shawnee Trail" in the usual and customary scope and course of his employment.

VII.

It is true that at the times and places mentioned in said amended libel, libelant was working on the mecano deck of the said USNS "Shawnee Trail" helping to load a jet airplane aboard said vessel. It is true that said jet airplane was raised from a barge alongside said USNS "Shawnee Trail" by said barge and floating crane BD 3031, carried over the deck of the said USNS "Shawnee Trail" by said derrick, and lowered to a point above the mecano deck of said USNS "Shawnee Trail." It is true that said plane had been stopped by respondent United States of America a distance of approximately three to six feet above said mecano deck. It is true that the operation of raising, carrying over, lowering and stopping said jet airplane, and of operating said crane, as found herein, was done solely and exclusively by respondent United States of America. It is true that at said time and place United States of America so negligently and carelessly managed, operated, maintained and con-

trolled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant, causing him grievous and severe personal injuries as hereinafter found.

VIII.

It is not true that at the time and place mentioned in the amended libel that the said USNS "Shawnee Trail" or the barge and floating crane BD 3031 were unseaworthy, but it is true that said barge and floating crane BD 3031 was carelessly and negligently operated and controlled by respondent United States of America and it is true that as a sole direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found.

IX.

It is true that the fact that libelant was working on the mecano deck did not in any way contribute to or cause the accident or injuries as found herein.

X.

It is not true that libelant's injuries were caused by any unseaworthiness of the said USNS "Shawnee Trail" or said barge and floating crane BD 3031, but it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libel-

ant, and libelant thereby was caused to and did incur grievous and severe personal injuries as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorally, and anterior wedging.

2. Fracture of the neural arch of the first lumbar vetebra.

3. Fractures of several transverse processes and lamina of the vertebrae.

4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.

5. Injury to several of the intervertebral discs in the lumbar spinal area.

6. Contusion of the spinal cord, and scar tissue in the cord.

7. A mesenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Trombo phelebitis of both legs.

9. Oblique fracture of the left clavicle.

10. Fractures of at least six ribs and a tremendous concussion injury of the entire chest.

11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.

12. Fractures of the left fibula at both the upper and lower ends.

13. Avulsion fracture of the right astragalus.

XI.

It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, anti-biotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.

It is true that libelant has suffered permanent injuries as follows:

1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with over-riding at the lower end.

All of the said injuries caused the libelant to suffer severe and excruitiating pain, suffering, distress, humiliation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excrutiating pain, suffering, distress, anxiety and humiliation, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occupation, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years.

XII.

It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of $7,322.32, which has been paid by his employer's compensation insurance carrier. It is true that libelant will be caused to incur expenses for medical, surgical and hospital treatment in the future and will require medical attention for the rest of his life.

XIII.

It is true that libelant was gainfully employed as a longshoreman at the time of the accident and was earning wages of approximately $64.00 per week, averaged over a period of 2½ years prior to his injury. It is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of a longshoreman in the Port of San Francisco has amounted to approximately $87.00 per week and had libelant not been injured and been able to work, it is true that he could have earned approximately the sum of $7,500.00 during the period from his injury to date.

XIV.

It is true that all and singular the premises are within the Admiralty and Maritime jurisdiction of this Court.

XV.

It is true that as a result of the injuries sustained by libelant as found herein, and by virtue of his permanent disability, pain and suffering, and his general and special damages, the Court finds that he has suffered and been damaged in the total sum of $125,000.00.

From the above Findings of Fact, the Court makes its Conclusions of Law:

I.

That the Court has jurisdiction of the parties and the subject matter by virtue of and pursuant to the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

II.

That the libelant has met the burden of proof of all the material allegations contained in his amended libel.

III.

That the libelant is entitled to have and recover from respondent United States of America, a sovereign, the sum of $125,000.00, as and for general and special damages, with interest thereon at 4% per annum from the date hereof, and costs of Court.

IV.

That a decree be entered herein in favor of libelant Frank Luehr and against respondent United States of America, a sovereign, in the sum of $125,-

000.00, with interest thereon at the rate of 4% per annum from the date hereof, and costs of Court.

Let the decree be entered.

Dated: March ....., 1952.

.....,
Judge of the U. S. District Court.

/s/ HERBERT RESNER,

/s/ RAOUL D. MAGANA,
Proctors for Libelant.

Receipt of copy acknowledged.

Lodged March 28, 1952.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Thursday, the 10th day of April, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER FOR SETTLEMENT OF FINDINGS OF FACT

This case came on regularly this day for settlement of findings of fact. After arguments by coun-

sel for respective parties, it is Ordered that the Findings be, and are hereby, settled as per Findings of Fact and Conclusions of Law and Judgment this day signed and filed.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY JONES STEVEDORING COMPANY, RESPONDENT-IMPLEADED

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libelant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation being represented by Dorr, Cooper and Hays and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that at all times mentioned in the libel herein Jones Stevedoring Company, a corporation, was and now is a corporation organized and existing under the laws of the State of California, and has a principal place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

II.

It is true that on or about January 23, 1952, Frank Luehr filed an Amended Libel in Personam against United States of America and American Pacific Steamship Co., wherein libelant claimed the sum of $242,200.00 together with special damages for personal injuries. That on February 25, 1952, respondent United States of America filed a petition bringing in Third Party, Jones Stevedoring Company, a corporation, under Admiralty Rule No. 56 of the United States Supreme Court, and in said petition incorporated by reference the allegations contained in said amended libel, and this Court finds and incorporates herein and makes a part hereof the Findings of Fact made and found in respect to the amended libel of libelant as herein as though the same were set forth in full herein.

III.

It is true that on or about January 1, 1950, Jones Stevedoring Company entered into a written contract with respondent United States of America

whereby said Jones Stevedoring Company, referred to in said contract as "the contractor," agreed to load or discharge cargoes, and in connection therewith to perform all of the duties of a stevedore on any vessel which the contracting officer might designate. That under the terms of said contract and in connection with the performance thereof among other things, the parties to said contract agreed in part in terms as follows:

"Article 1. General Scope of the Contract.

"(b) Contractor's Duties. (1) In loading vessels, the contractor shall remove and handle cargo from open-top railroad cars, trucks, alongside ship, also from barges, lighters, scows and cars on car floats alongside ship, in pier sheds and place of rest on pier. The contractor shall stow said cargo in any space in the vessel, including bunker space, decks, 'tween decks, on deck, fore and aft peaks, and deep tanks in order directed by and in a manner satisfactory to the contracting officer, the master of the vessel or his representative."

"(h) Gear Supplied by Government. (1) The Government at its own expense, will furnish lighters, floating derricks, and shore cranes. Floating derricks will not be furnished when, in the opinion of the Contracting Officer, the ship's equipment can be used satisfactorily."

"Article 14. Liability and Insurance.

"(a) The Contractor.

"(1) shall be liable to the Government for

any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

"(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

"(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

"(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury or death, and the Contractor, its officers, agents and employees by the exercise of due diligence could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

"(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific direction of the Contracting Officer."

IV.

It is true that said contract at all times material was in full force and effect, said contract being designated DA 04-197; TC-246; and it is true that at the time of the occurrence of the injury described in the amended libel said Jones Stevedoring Company was engaged in loading jet airplanes aboard the USNS Shawnee Trail. It is not true that said derrick barge No. BD 3031 which was owned by respondent United States of America, was loaned to Jones Stevedoring Company pursuant to or under the terms of said contract, or at all, and it is true that said derrick barge No. BD 3031 was manned, operated and controlled exclusively, and to the exclusion of all others, by the United States of America, and it is true that respondent-impleaded Jones Stevedoring Company had no direction or control of the use or management or operation of said derrick barge.

V.

It is true that libelant was injured while performing work aboard the vessel USNS Shawnee Trail in the course of his employment by Jones Stevedoring Company, which said work was in performance of the said contract. It is not true that

any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant. It is true that Jones Stevedoring Company did not direct libelant to stand under a swinging load in a precarious position several yards above the deck of the vessel, and it is true that decking and/or scaffolding and/or other safety appliances were not required or necessary and that Jones Stevedoring Company was not required or under any duty to provide or request any of these appliances. It is not true that said injuries suffered by libelant, or any of them, were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants or agents, and it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent United States of America.

VI.

It is true that United States of America is liable for damages to libelant under the amended libel herein, but such liability was neither in whole or in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, its employees, agents, or servants, but

said liability is exclusively that of United States of America, its exclusive negligence having been the sole and proximate cause of the accident and injuries to libelant herein. It is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and this Court finds that there is no liability on the part of Jones Stevedoring Company under the terms of said contract, or otherwise, or at all.

VII.

That all and singular the premises are within the Admiralty and Maritime jurisdiction of the above-entitled Court.

VIII.

That under the terms of said contract, and in connection with the performance thereof, among other things, the parties to said contract agreed further, in part, in terms as follows:

"Article 14. Liability and Insurance.

"(c) The Contractor shall at its own expense procure and maintain during the term of this contract, insurance as follows:

"(1) Standard Workmen's Compensation and Employers' Liability Insurance and Longshoremen's and Harbor Workers' Compensation Insurance, or such of these as may be proper under applicable state or federal statutes. The Contractor may, however, be self-insurer against the risk in this subparagraph

(1) if it has obtained the prior approval of the Contracting Officer. This approval will be given upon receipt of satisfactory evidence that the Contractor has qualified as such self-insurer under applicable provisions of law.

"(2) Bodily Injury Liability insurance in an amount of not less than $50,000 any one accident or occurrence.

"(3) Property Damage Liability insurance (which shall include any and all property, whether or not in the care, custody or control of the Contractor) in an amount of not less than $250,000 on account of any one accident."

IX.

That said Contractor, (Jones Stevedoring Company) did procure insurance pursuant to the terms of said contract from the Fireman's Fund Insurance Company of San Francisco.

X.

That said insurance contracts provide by indorsement

"Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy."

XI.

That the issue of whether or not Jones Stevedoring Company and/or Fireman's Fund Insurance

Company must reimburse the United States for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action.

XII.

That the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action.

From the above Findings of Fact, the Court makes its

Conclusions of Law

I.

That respondent United States of America was negligent, and its negligence was the sole proximate cause of the accident and resulting injuries to libelant. That there was no negligence on the part of respondent-impleaded Jones Stevedoring Company which proximately, or to any degree, or at all caused or contributed to the said accident or injuries to said libelant.

II.

That respondent United States of America, a sovereign, has failed to sustain the burden of proof of the material allegations contained in the Petition to Bring in Third Party Under Rule No. 56.

III.

That impleaded-respondent Jones Stevedoring Company is not liable to libelant nor to respondent United States of America for the whole or any part of the said loss or damage.

IV.

That impleaded-respondent Jones Stevedoring Company, a corporation, is entitled to a decree of dismissal of the Petition of the United States of America to bring in Third Party Under Rule No. 56 and to have and recover its costs of suit herein, reserving however, the right of the United States, if any, to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Workers' Act, insurance policies herein referred to by reason of the waiver of subrogation agreement.

That a decree of dismissal be entered herein in favor of Jones Stevedoring Company, respondent-impleaded, and against the United States of America, a sovereign, on its causes of Petition to Bring in Third Party under Rule No. 56, exonerating said Jones Stevedoring Company from any liability under the contract for indemnity, and for its costs of suit herein.

V.

That the decree of dismissal entered herein in favor of Jones Stevedoring Company be without prejudice to the right of the United States, if any, to proceed against Jones Stevedoring Company for such amounts found to be compensable pursuant to

33 U.S.C.A. Section 914 to libelant by Jones Stevedoring Company as hereinabove set out.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Submitted by:

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,
Proctors for Jones
Stevedoring Company.

Receipt of copy acknowledged.

Lodged March 31, 1952.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for hearing on the 17th, 18th, 19th, 20th, 21st, 24th and 25th days of March, 1952, and evidence both oral and documentary having been introduced, the libelant being represented by Herbert Resner and Raoul D. Magana, and the respondent United States of America being represented by Chauncey Tramutolo, United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart

Harrison, Attorney, Department of Justice, and respondent-impleaded Jones Stevedoring Company, a corporation, being represented by John H. Black and Edward R. Kay, and the respondent American Pacific Steamship Co., a corporation, being represented by Dorr, Cooper and Hayes and J. T. Cooper, having been heretofore dismissed as a party respondent, and after due deliberation, the Court makes its

Findings of Fact

I.

It is true that libelant Frank Luehr is and during all the times herein mentioned was a resident of the County of Alameda, State of California, and resident within the jurisdiction of the above-entitled Court.

II.

It is true that during all the times involved in this cause the respondent United States of America owned a certain tank ship known and designated as the USNS "Shawnee Trail," which vessel was operated by the respondent American Pacific Steamship Company pursuant to a contract between that company and United States of America, in interstate and foreign commerce.

III.

It is true that libelant brought and maintained the amended libel herein under the Suits in Admiralty Act (Act of March 9, 1920, c. 95 41 Stat. 325, 46 U.S.C. §§ 741-752), under the Public Vessels Act (Act of March 3, 1925, c. 428, 48 Stat. 112, 46 U.S.C. §§ 781-790), and the General Maritime Law.

IV.

It is true that on July 28, 1950, in the forenoon, the said USNS "Shawnee Trail" was docked at the port of Alameda, California, at Army Transit Depot No. 8, and was afloat on navigable waters of the United States.

V.

It is true that at all times mentioned in said amended libel respondent United States of America owned a certain barge and floating crane designated as Army Barge BD 3031, which barge and crane were then and there, and at all times material herein, operated, managed, maintained and controlled exclusively by United States of America, acting through the United States Army, its personnel and civilian employees.

VI.

It is true that at the times mentioned in said amended libel, libelant was in the employ of Jones Stevedoring Company as a longshoreman, and was then and there necessarily working aboard said USNS "Shawnee Trail" in the usual and customary scope and course of his employment.

VII.

It is true that at the times and places mentioned in said amended libel, libelant was working on the mecano deck of the said USNS "Shawnee Trail" helping to load a jet airplane aboard said vessel. It is true that said jet airplane was raised from a barge alongside said USNS "Shawnee Trail" by

said barge and floating crane BD 3031, carried over the deck of the said USNS "Shawnee Trail" by said derrick, and lowered to a point above the mecano deck of said USNS "Shawnee Trail." It is true that said plane had been stopped by respondent United States of America a distance of approximately three to six feet above said mecano deck. It is true that the operation of raising, carrying over, lowering and stopping said jet airplane, and of operating said crane, as found herein, was done solely and exclusively by respondent United States of America. It is true that at said time and place United States of America so negligently and carelessly managed, operated, maintained and controlled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant, causing him grievous and severe personal injuries as hereinafter found.

VIII.

It is not true that at the time and place mentioned in the amended libel that the said USNS "Shawnee Trail" or the barge and floating crane BD 3031 were unseaworthy, but it is true that said barge and floating crane BD 3031 was carelessly and negligently operated and controlled by respondent United States of America and it is true that as a direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found.

IX.

It is true that the fact that libelant was working on the mecano deck did not in any way contribute to or cause the accident or injuries as found herein.

X.

It is not true that libelant's injuries were caused by any unseaworthiness of the said USNS "Shawnee Trail" or said barge and floating crane BD 3031, but it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libelant, and libelant thereby was caused to and did incur grievous and severe personal injuries as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorally, and anterior wedging.

2. Fracture of the neural arch of the first lumbar vertebra.

3. Fractures of several transverse processes and lamina of the vertebra.

4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.

5. Injury to several of the intervertebral discs in the lumbar spinal area.

6. Contusion of the spinal cord, and scar tissue in the cord.

7. A masenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Thrombo phelebitis of both legs.

9. Oblique fracture of the left clavicle.

10. Fractures of at least six ribs and a tremendous concussion injury of the entire chest.

11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.

12. Fractures of the left fibula at both the upper and lower ends.

13. Avulsion fracture of the right astragalus.

XI.

It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, anti-biotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.

It is true that libelant has suffered permanent injuries as follows:

1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of

some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with overriding at the lower end.

All of the said injuries caused the libelant to suffer severe and excrutiating pain, suffering, distress, humilation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excrutiating pain, suffering, distress, anxiety and humila-

tion, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occupation, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years.

XII.

It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of $7,322.32, which has been paid by his employer's compensation insurance carrier. It is true that libelant will be caused to incur expenses for medical, surgical and hospital treatment in the future and will require medical attention for the rest of his life.

XIII.

It is true that libelant was gainfully employed as a longshoreman at the time of the accident and was earning wages of approximately $64.00 per week,

averaged over a period of 2½ years prior to his injury. It is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of a longshoreman in the Port of San Francisco has amounted to approximately $87.00 per week and had libelant not been injured and been able to work, it is true that he could have earned approximately the sum of $7,500.00 during the period from his injury to date, and that compensation has been paid by libelant's employer in the amount of $3,082.20 to date.

XIV.

It is true that all and singular the premises are within the Admiralty and Maritime jurisdiction of this Court.

XV.

It is true that as a result of the injuries sustained by libelant as found herein, and by virtue of his permanent disability, pain and suffering, and his general and special damages, the Court finds that he has suffered and been damaged in the total sum of $125,000.

From the Above Findings of Fact, the Court Makes Its Conclusions of Law:

I.

That the Court has jurisdiction of the parties and the subject matter by virtue of and pursuant to the Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525, 46 U.S.C. §§ 741-752), the Public Vessels Act (Act of March 3, 1925, c. 428, 43 Stat. 112,

46 U.S.C. §§ 731-790), and the General Maritime Law.

II.

That the libelant has met the burden of proof of all the material allegations contained in his amended libel.

III.

That the libelant is entitled to have and recover from respondent United States of America, a sovereign, the sum of $125,000.00, as and for general and special damages, with interest thereon at 4% per annum from the date hereof, and costs of Court.

IV.

That a decree be entered herein in favor of libelant Frank Luehr and against respondent United States of America, a sovereign, in the sum of $125,000.00, with interest thereon at the rate of 4% per annum from the date hereof, and costs of Court.

Let the decree be entered.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the U. S. District Court.

[Endorsed]: Filed April 10, 1952.

In the United States District Court, for the Northern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN PACIFIC STEAMSHIP CO., a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY a Corporation,

Respondent-Impleaded.

FINAL DECREE

(Re Jones Stevedoring Co.)

The above-entitled cause having come on regularly to be heard on the pleadings and proofs and having been submitted by the advocates of the repective parties, and after due deliberation having been had and Findings of Fact and Conclusions of Law having been duly settled and signed;

It Is Ordered, Adjudged and Decreed that respondent, United States of America, a sovereign, take nothing from respondent-impleaded Jones Stevedoring Company, a corporation, on its Petition to Bring in Third Party under Rule No. 56, and that said Petition to Bring in Third Party un-

der Rule No. 56 be and the same is hereby dismissed, reserving, however, the rights, if any, of the United States of America to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Workers' Act insurance policies by reason of the waiver of subrogation agreement.

It Is Further Ordered, Adjudged and Decreed that Jones Stevedoring Company, a corporation, have and recover from respondent United States of America the sum of $362.00 as and for costs.

Dated: April 10th, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Lodged March 31, 1952.

[Endorsed]: Filed April 10, 1952.

Entered April 11, 1952.

In the United States District Court, for the Northern District of California, Southern Division

In Admiralty No. 25833

FRANK LUEHR,

Libelant,

vs.

UNITED STATES OF AMERICA, AMERICAN PACIFIC STEAMSHIP CO., a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY, a Corporation,

Respondent-Impleaded.

FINAL DECREE

(Re Frank Luehr)

The above-entitled cause having come on regularly to be heard on the pleadings and proofs and having been submitted by the advocates for the respective parties, and after due deliberations having been had and after Findings of Fact and Conclusions of Law having been duly settled and signed;

It Is Ordered, Adjudged and Decreed that libelant Frank Luehr have and recover general and special damages, on his Amended Libel herein, against respondent United States of America in the sum of $125,000.00, together with interest thereon at the rate of 4% per annum from the date hereof until paid.

It Is Further Ordered, Adjudged and Decreed that libelant recover his costs of Court herein in the sum of $206.90.

Dated: 10th April, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States District Court.

Lodged March 28, 1952.
[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the respondent United States of America hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final decree made and entered herein on April 11, 1952, in favor of the above-named libelant, and from the final decree entered herein on April 11, 1952, dismissing respondent-impleaded Jones Stevedoring Company.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondent United States of America.

Affidavits of service by mail attached.
[Endorsed]: Filed July 8, 1952.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the Court that due and timely application for appeal herein was made by respondent United States of America, by filing Notice of Appeal herein on July 8, 1952, the within appeal is hereby allowed.

Done in Open Court this 14th day of July, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

CITATION ON APPEAL

To Frank Luehr, Libelant, and to Herbert Resner, Esq., His Proctor, and to the Jones Stevedoring Company, a Corporation, Respondent-Impleaded, and to Messrs. Black and Kay, Its Proctors:

Whereas, the United States has lately appealed to the United States Court of Appeals for the Ninth Circuit from the entry of the decrees granting recovery as prayed by libelant, and denying indemnity against Jones Stevedoring Company, which decrees were entered in the District Court of the United States for the Northern District of Cali-

fornia, Southern Division, on the 11th day of April, 1952;

You Are, Therefore, Hereby Cited to appear before the said United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, California, at the next term of the Court, thirty days after the date of this citation to do and receive what may appertain to justice to be taken in the premises.

Given Under My Hand in the City and County of San Francisco, State of California, on the 14th day of July, 1952.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Affidavits of service by mail attached.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Ordered that the appellant United States of America may have to and including October 6, 1952, to file the Apostles on Appeal in the United States Court of Appeals for the Ninth Circuit.

Dated: July 14th, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]. Filed July 14, 1952.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The above-named respondent, United States of America, who is the petitioner and appellant herein, hereby assign errors in the proceedings, Findings of Fact, and Conclusions of Law, and Final Decree herein, as follows:

I.

The District Court erred in finding and holding that the injuries to the libelant were the sole, direct and proximate result of the exclusive negligence and carelessness of respondent, United States of America.

II.

The District Court erred in finding and holding that it is not true that any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel (and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant.)

III.

The District Court erred in finding and holding that the Derrick Barge BD 3031 was operated, manned, and controlled exclusively, to the exclusion of all others, by the United States of America

and that it is true that respondent-impleaded Jones Stevedoring Company had no direction or control of the use or management of said derrick barge.

IV.

The District Court erred in finding and holding that Jones Stevedoring Company did not direct libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel, and that it is not true that said injuries suffered by libelant or any of them were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants, or agents, and that it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent, United States of America.

V.

The District Court erred in finding and holding that United States of America is liable for damages to libelant under the amended libel herein, and such liability was neither in whole or in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, its employees, agents, or servants, but said liability is exclusively that of United States of America, its exclusive negligence having been the sole and proximate cause of the accident and injuries to libelant herein.

VI.

The District Court erred in finding and holding that it is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and that there is no liability on the part of Jones Stevedoring Company under the terms of said contract, or otherwise, or at all.

VII.

That the District Court erred in finding and holding that the issue of whether or not Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States of America for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action.

VIII.

That the District Court erred in finding and holding that the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action.

IX.

That the District Court erred in failing to find

that the Jones Stevedoring Company and its compensation underwriters are liable to respondent, United States of America, for such portion of the judgment as is represented by cost of medical attention to libelant both past and future.

X.

That the District Court erred in failing to find that the Jones Stevedoring Company and its compensation underwriter are liable to the respondent, United States of America, for such portion of the judgment as is founded upon loss of earnings for which libelant's employer became liable under the provision of the Longshoremen's and Harbor Workers' Act and the contract of insurance herein referred to.

XI.

That the District Court erred in its Conclusions of Law in concluding that respondent United States of America was negligent, and its negligence was the sole proximate cause of the accident and resulting injuries to libelant.

XII.

The District Court erred in finding and holding that there was no negligence on the part of respondent-impleaded Jones Stevedoring Company which proximately, or to any degree, or at all caused or contributed to the said accident or injuries to said libelant.

XIII.

That the District Court erred in its Conclusions of Law in concluding that respondent, United

States of America, a sovereign, has failed to sustain the burden of proof of the material allegations contained in the Petition to Bring in Third Party Under Rule No. 56.

XIV.

That the District Court erred in its Conclusions of Law in concluding that impleaded-respondent Jones Stevedoring Company is not liable to libelant nor to respondent United States of America for the whole or any part of the said loss or damage.

XV.

That the District Court erred in its Conclusions of Law in concluding that impleaded-respondent Jones Stevedoring Company, a corporation, is entitled to a decree of dismissal of the Petition of the United States of America, to bring in Third Party Under Rule 56, and to recover its cost of suit herein.

XVI.

That the District Court erred in finding that it is true that from the time of libelant's injury on July 28, 1950, until the date hereof that the average weekly earnings of longshoremen in the Port of San Francisco has amounted to approximately $87.00 a week and had libelant not been injured and been able to work, and in finding and concluding that libelant could have earned approximately the sum of $7,500 during the period of his injury to date.

XVII.

That the District Court erred in finding and holding that as a result of the injuries sustained by libelant, and by virtue of his permanent disability, pain and suffering, and his general and special damages, that he has suffered and been damaged in the total sum of $125,000.00.

XVIII.

That the District Court erred in failing to find that the amounts payable or paid by way of compensation and medical expenses should be credited to the judgment, against respondent, United States of America, by virtue of their having been paid or become payable by the compensation carrier which has expressly waived its rights against respondent, United States of America, as subrogee under Section 33 of the Longshoremen's and Harbor Workers' Act.

XIX.

That the District Court erred in failing to find that the judgment should be reduced by the amount of $7,322.32 for medical expenses that have been paid by the libelant's employer's compensation carrier.

XX.

That the District Court erred in failing to find that the judgment should be reduced by the amount of $3,082.20 representing payments voluntarily made by Jones Stevedoring Company's compensation carrier.

XXI.

That the District Court erred in failing to find that the judgment should be reduced by the estimated cost of future medical care, for which the libelant's employer's compensation carrier has become liable, and has expressly waived its rights against respondent, United States of America, as subrogee.

XXII.

That the District Court erred in failing to find that the judgment against the United States should be reduced in the amount of $11,000.00 which is the maximum amount payable by the employer's compensation carrier for the permanent partial disability suffered by libelant, said compensation carrier having expressly waived its rights against respondent, United States of America, as subrogee.

XXIII.

That the District Court erred in its Conclusions of Law in concluding that libelant is entitled to have and recover from respondent, United States of America, a sovereign, the sum of $125,000.00, as and for general and special damages, with interest thereon at the rate of 4% per annum from date of entry of the decree.

XXIV.

That the District Court erred in its decree in ordering that libelant take from the United States of America the sum of $125,000.00 together with interest and costs thereon.

XXV.

That the District Court erred in failing to find separately the amount of damages awarded as special damages and the amount awarded as general damages.

XXVI.

That the District Court erred in its decree adjudging that the United States take nothing from respondent-impleaded Jones Stevedoring Company on its Petition to Bring in Third Party Under Rule 56, and in dismissing said petition.

XXVII.

That the District Court erred in failing to decree that the United States take from Jones Stevedoring Company full indemnity for any and all liability to libelant in the cause.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ J. STEWART HARRISON,
Attorney, Department of Justice, Proctors for Respondents, United States of America.

[Endorsed]: Filed September 19, 1952.

In the District Court of the United States for the Northern District of California, Southern Division

No. 25833

FRANK LUEHR,

Libelant,

vs.

THE UNITED STATES OF AMERICA, AMERICAN PACIFIC STEAMSHIP CO., a Corporation,

Respondents,

vs.

JONES STEVEDORING COMPANY, a Corporation,

Respondent-Impleaded.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Monday, March 17, 1952

Appearances:

For Libelant:

HERBERT RESNER, ESQ., and
RAOUL D. MAGANA, ESQ.

For Respondent U. S. A.:

STEWART HARRISON, ESQ., and
CARL E. LUNDIN,
Special Assistants to the United States Attorney.

For Respondent-Impleaded Jones Stevedoring Co.:

EDWARD R. KAY, ESQ., and
JOHN H. BLACK, ESQ.

March 17, 1952—10:00 A.M.

The Clerk: Frank Luehr, Libelant, vs. the United States of America and American Pacific Steamship Company, Respondents, vs. Jones Stevedoring Company, Respondent-Impleaded, for trial.

Mr. Resner: Ready, your Honor.

Mr. Harrison: Ready, your Honor.

Mr. Kay: Ready, your Honor.

The Court: You may proceed.

(Whereupon opening statements were made by counsel.)

The Court: Here are some young ladies with documents now. Maybe we can avoid them coming back if you want to call them.

Mr. Resner: Thank you, Judge.

The Court: If that is agreeable to everyone.

Mr. Kay: Yes, your Honor.

Mr. Resner: Will you come up here with the records?

Mr. Magana: May I address the witness, your Honor?

The Court: Surely.

Mr. Magana: Will you take the stand?

MARALYNN OSBORNE

called as a witness on behalf of the libelant, sworn.

The Clerk: State your full name to the [2*] Court.

A. Maralynn Osborne.

Direct Examination

By Mr. Magana:

Q. Miss Osborne, what is your position?

A. Medical record librarian, Merritt.

Q. Did you, in response to a subpoena, bring with you the records covering one Frank Luehr?

A. I did.

Q. And does that include all the X-rays, as well as the nurses' notes and hospital reports?

A. Yes, it does.

Q. Do you have them all, the X-rays, contained within one envelope? A. Yes.

Mr. Magana: May the X-rays, then, your Honor, be admitted as plaintiff's Exhibit No. 1?

The Court: May be admitted and marked.

The Clerk: Respondent's Exhibit 1 admitted and filed in evidence.

(Whereupon the X-rays above referred to were received in evidence and marked Libelant's Exhibit No. 1.)

Mr. Magana: You have in addition with you an envelope containing what, the hospital records, as well as the nurses' notes? A. That is right.

Q. I notice you have another envelope there. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Maralynn Osborne.)

A. That has nothing to do with this case.

Q. Excuse me; thank you.

Mr. Magana: May the envelope then containing the hospital records and nurses' notes be marked as Libelant's Exhibit No. 2?

The Court: May be admitted and marked.

(Thereupon the envelope above referred to was received in evidence and marked Libelant's Exhibit No. 2.)

The Court: Any questions, gentlemen?

Mr. Harrison: None, your Honor.

The Witness: May I have three separate receipts on those, for the three papers?

The Court: The Clerk will give you a receipt. Anything of this young lady?

(Witness excused.)

MASAKO ABE

called as a witness on behalf of the libelant, sworn.

The Court: What is your full name?

The Witness: Masako Abe.

The Court: Will you spell that for the Reporter?

The Witness: M-a-s-a-k-o A-b-e.

The Court: And what is your business or occupation?

The Witness: Medical record librarian.

The Court: Where? [4]

The Witness: The Alameda Hospital.

The Court: How long have you been so engaged?

(Testimony of Masako Abe.)

The Witness: Six years.

The Court: What is that?

The Witness: Six years.

The Court: Six years. Proceed.

Direct Examination

By Mr. Magana:

Q. Miss Abe, did you bring with you in response to a subpoena all of the records covering the admission of one Frank Luehr since July 28th?

A. Yes.

Q. 1950? A. Yes.

Q. Do you have with you all the X-rays that were taken there at the Alameda Hospital?

A. Yes.

Mr. Magana: May the X-ray records then, be marked as Libelant's Exhibit No. 3 next in order, your Honor?

The Court: May be admitted and marked.

The Clerk: Libelant's Exhibit 3 in evidence.

(Whereupon the X-rays above referred to were received in evidence and marked Libelant's Exhibit No. 3.)

Q. (By Mr. Magana): You have, in addition thereto, I notice, three separate envelopes.

A. Yes, three. [5]

Q. All right. Do those cover different dates of admission? A. No, it is all one admission.

Q. And do they cover the same features, or are the nurses' notes and matters of that sort kept separate?

(Testimony of Masako Abe.)

A. The nurses' notes are in two parts.

Q. All right. Would you just draw one of the envelopes, please, the top one, and what is that?

A. This is the nurses', part of the nurses' notes.

Q. All right.

Mr. Magana: May that be marked as Libelant's Exhibit No. 4, next?

The Court: May be admitted and marked.

Q. (By Mr. Magana): Would you then indicate the next envelope?

The Clerk: Libelant's Exhibit 4 admitted and filed in evidence.

(Whereupon the envelope above referred to was received in evidence and marked Libelant's Exhibit No. 4.)

A. This is the nurses' notes, part two.

Mr. Magana: May that be admitted in evidence as Libelant's Exhibit No. 5?

The Court: May be admitted next in order.

The Clerk: Libelant's Exhibit 5 admitted and filed in evidence.

(Whereupon the nurses' notes above referred to were [6] received in evidence and marked Libelant's Exhibit No. 5.)

Q. (By Mr. Magana): The final envelope?

A. Yes. This is the third part of the nurses' notes.

Mr. Magana: May that be admitted in evidence as Libelant's Exhibit 6?

The Court: May be admitted next in order.

(Testimony of Masako Abe.)

The Clerk: Libelant's Exhibit 6 admitted and filed in evidence.

(Whereupon the nurses' notes referred to above were received in evidence and marked Libelant's Exhibit No. 6.)

Q. (By Mr. Magana): I think you have another envelope—does that——

A. No, this is the receipt.

Mr. Magana: Thank you, very much.

The Court: Any questions?

Mr. Harrison: No questions.

The Court: You may step down.

(Witness excused.)

The Court: We will take an adjournment until 2 o'clock.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [7]

Afternoon Session, Monday, March 17th, 1952, 2:00 P.M.

The Court: Proceed.

Mr. Resner: We will call Mr. Ted Spirz, your Honor.

Mr. Kay: Pardon me, Mr. Resner, and your Honor; we have this model here that has just been finished in time for the testimony, fortunately, and I would like to, out of order, and I am sure these gentlemen will stipulate, to present the model man

here simply to identify that and let us offer it in evidence. May we do that?

The Court: No objection.

Mr. Resner: No objection.

Mr. Harrison: No objection.

JAMES B. WATERS

called as a witness on behalf of respondent-impleaded Jones, being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. James B. Waters.

Direct Examination

By Mr. Kay:

Q. Mr. Waters, what is your occupation?

A. Pattern maker and model maker.

Q. How long have you been engaged in that work? A. Oh, about fifty years.

Q. Fifty years? [8] A. Yes.

Q. For whom are you working?

A. American Pattern Company.

Q. You had occasion——

The Court: Who is the American Pattern Company?

A. Down at George Suber's, 6th and Bryant.

The Court: How long have you been in that business?

A. Oh, been in it since the first World War.

The Court: All right.

(Testimony of James B. Waters.)

Q. (By Mr. Kay): Mr. Waters, you had occasion to build that model that is resting over there of that section of the mechano deck on a tanker; is that correct? A. Yes, sir.

Q. You did that pursuant to my directions; is that correct? A. Yes, sir.

Q. And I gave you some information in the nature of a photograph purporting to be photographs of the Shawnee Trail, that is, that portion of that particular vessel, is that right?

A. That is right.

Q. And also blueprints from which you took certain measurements so that you could build that to scale; is that correct? A. To scale, yes.

Q. Is that what you did in this case?

A. Yes. [9]

Mr. Kay: I think that is all.

Mr. Harrison: I have one question, your Honor.

Cross-Examination

By Mr. Harrison:

Q. Were the blueprints of the Shawnee Trail?

Mr. Kay: No. Let me say this—I should have indicated that—we weren't able to get blueprints of the Shawnee Trail but we did get them of her sister ship, and I am sure if you want to look into it further, Mr. Harrison, you will find that is correct. We were careful about that.

Q. (By Mr. Harrison): Do you remember any of the dimensions, Mr. Waters? A. Yes.

(Testimony of James B. Waters.)

Q. How high is the top of the fore and aft cross beams from the top deck?

A. Seven feet and——

The Court: Step down here and show us.

(Witness went to model.)

Mr. Harrison: My question, your Honor, pertains to the distance between the top of one of these fore and aft beams to the deck of the vessel.

A. It was seven feet, two inches.

Q. From where is that measurement taken?

A. From the deck to the top of the girder.

Q. Isn't it correct a tanker has a camber to the deck and [10] it would be less space from here to here on the inboard side than on the outboard side?

Mr. Kay: We will stipulate to that. I think that is a fair statement.

Q. (By Mr. Harrison): Do you know how much camber there is on a tanker?

A. No, I do not.

Mr. Harrison: Well, perhaps we can get that.

Mr. Kay: Yes, we will stipulate to that. That is correct.

Mr. Harrison: That is all.

Mr. Kay: What is the scale?

A. One inch to the foot.

Mr. Kay: Your Honor, we would like to introduce that as respondent's exhibit.

The Court: No objection?

Mr. Harrison: No objection.

Mr. Resner: No objection.

(Testimony of James B. Waters.)

The Court: Let it be admitted and marked.

(Model referred to was admitted into evidence as respondent-impleaded Jones' Exhibit A-1.)

(Witness excused.)

Mr. Resner: We will now call Mr. Ted Spirz, your Honor. [11]

TED SPIRZ

called as a witness on behalf of the libelant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Ted Spirz, walking boss, Jones Stevedoring Company.

Direct Examination

By Mr. Resner:

Q. Where do you live?

A. 54 Langton, San Francisco.

Q. What is your age? A. Pardon me?

Q. Your age? A. Thirty-seven.

Q. How long have you been a longshore walking boss? A. Approximately eight years.

Q. How long have you been in the longshore trade?

A. Since the latter part of '29, with the exception of two years. I went back to school, then I came back to school, then I came back to the front.

Q. Now, just what are the duties of a walking

(Testimony of Ted Spirz.)

boss in the longshore industry, generally speaking?

A. Well, he is in charge of the longshoremen and the gangs to see that they do their—well, I tell them where to put their cargoes, how to do it, and if it isn't correct, correct them and order them around. I am in charge of loading the vessel or discharging. [12]

Q. I direct your attention to July the 28th of the year 1950. Do you recall that day, Mr. Spirz?

A. Yes, I do.

Q. Was that the day Mr. Luehr, the libelant in this case, was injured? A. That is correct.

Q. On that day you were employed by what concern? A. Jones Construction Company.

Q. Did you witness this accident? A. Yes.

Q. Would you please explain to his Honor, Judge Roche, the operation that was in progress just before the accident happened?

A. Well, we were loading airplanes—these were jets—with a heavy lift barge. The heavy lift barge was offshore and there was another floating barge alongside that had the airplanes. The heavy lift barge would pick up the airplanes from the barge, put it up over the deck, and that happened to be at the inshore side, so he would come across practically the whole deck, lower away, and then we would get hold of the airplane. I would tell the whistle man where I wanted the plane, and if it had to be moved a little bit one way or the other he would move it to where I would want it.

Then when he got exactly over the spot where we

(Testimony of Ted Spirz.)

wanted, we would fix the fore and aft moveable beams just [13] exactly so, and then the platform would have to be exactly so, then I would tell him everything was in order and he would land the plane and then he would go on to the next plane.

Q. Mr. Spirz, this offshore crane, floating barge, you say there was an operator on that rig?

A. There is an operator, yes.

Q. On that rig? A. Yes.

Q. By whom was that operator employed?

A. By the army, I presume. It is an army barge. A civil service.

Q. You mentioned a whistle man?

A. Well, he is in charge of the whole barge. The whistle man is in charge. He has control of the whole barge. It is his barge. The operator takes orders from him.

Q. Who employs the whistle man?

A. He is a civil service man, too.

Q. Employed by the army?

A. By the army, so far as I know.

Q. Does this plane—strike that, please. Does this barge with these planes on it come up alongside the vessel you are about to load?

A. Yes. The barge comes from Sacramento, from McClellan Field up there; comes down and they bring it alongside the [14] Shawnee Trail and it was tied up alongside the Shawnee Trail and the heavy lift barge is tied up there, and they pick it up off the barge and bring it on the deck.

Q. Who has direction over that operation of

(Testimony of Ted Spirz.)

picking the plane up from the barge, heavy lift barge, and bringing it over to the Shawnee Trail?

A. The whistle man. The man in charge of the heavy lift barge.

Q. The army whistle man? A. Yes.

Q. Up until that point do the longshoremen have anything to do with the operation?

A. We have what they call the truck men and a jitney driver, and if there isn't sufficient help on the barge they will secure the bridle to the plane. They will secure the tag lines to the plane, and they would help hold onto the tag lines as the heavy lift barge would pick it up. But they had no other orders but to do that.

Q. Did they have any participation in the actual lifting and the moving of the plane from the barge onto the vessel?

A. No, they have nothing to do with that whatsoever. They just secure the bridle and make the tag lines secured onto the stand of the landing gear.

Q. Whose exclusive job would it be, then, to pick up the planes off the barge and move them over and land them on the [15] vessel, the Shawnee Trail?

Mr. Harrison: I object to that as calling for a conclusion of the witness as to whose job it was exclusively. I think he can testify as to who did what part. Control of the operation is not within the knowledge of the witness.

Mr. Resner: I will withdraw the question and ask:

Q. I will ask you whether or not any longshore-

(Testimony of Ted Spirz.)

man had anything to do with actual lifting of the plane and moving of it over the deck and lowering of it onto the Shawnee Trail?

A. Absolutely not.

Q. Who does that? A. The whistle man.

Q. And who else?

A. The operator operates the crane, but the whistle men give him the orders. If the whistle man didn't give him the orders, he wouldn't do anything. He waited for the signal.

Q. The crane operator——

A. Waited for orders.

Q. From the whistle man? A. Correct.

Q. Then the barge operator would pick up the plane, move it over and lower it on signals from the whistle man? A. Correct.

Q. I am going to show you a photograph, Mr. Spirz, and ask you to look at it and identify it for His Honor. [16]

A. That is a mechano deck on a tanker.

The Court: That is what?

A. A mechano deck on a tanker. This is the tanker (indicating). This is the main deck and this is the mechano part of the deck on the outboard side —on both sides. This structure here is all mechano.

Mr. Resner: The witness is pointing to the beams constructed over the main deck and the moveable beams, your Honor, as the mechano structure or the mechano deck.

Q. (By Mr. Resner): Can you tell which way you are looking in that picture, Mr. Spirz?

(Testimony of Ted Spirz.)

A. Yes, we are looking from the forward end to the bridge.

Q. You are looking from the bow to the midship house, to the bridge? A. Correct.

Q. The port side, then, would be on the right hand side of the picture?

A. Right hand side of the picture, yes, sir.

Q. Starboard side would be on the left or to the dock side here? A. Correct.

Q. I point to an object in the center of the picture. What is that? A. That is the mast.

Q. That is the mast? [17] A. Correct.

Q. Do you see the catwalk there?

A. Right here on the right hand side of the picture, of the mast (indicating).

Q. Extending right up the center on the right hand side in the lower part of the picture to the house?

A. This is not exactly the center. The mast is in the center, approximately, but the catwalk is a little——

Q. A little to one side? A. Yes, sir.

Q. Does that fairly represent the mechano structure of the Shawnee Trail as it appeared on the day of the accident? A. Yes.

Mr. Resner: I might tell your Honor, this appears to be a picture of the Shawnee Trail taken at Wilmington, California, by Will Hayes on December 7, 1951. I will offer this photograph as libelant's next exhibit, if I may.

(Testimony of Ted Spirz.)

The Court: No objection?

Mr. Harrison: No objection.

Mr. Kay: No objection.

The Court: Let it be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 7.)

Q. (By Mr. Resner): Mr. Spirz, there is the model, respondent-impleaded Jones' Exhibit A-1. Can you tell us what portion [18] of the vessel, as it appears from the picture, is represented by the model, Mr. Spirz?

A. That is the port side of the mechano deck, and that is the house where the bridge is, and that is the ladder—if you notice, Judge, that is the ladder right there (indicating) coming down to the main deck. This part here is part of the bridge.

Q. (By Mr. Resner): I am going to ask you, Mr. Spirz, to draw an area line about that portion of the deck of the vessel which corresponds generally to the model section?

A. (Drawing). Take it right along here and up to the house.

Q. All right.

Mr. Resner: I will mark it, then.

Q. (By Mr. Resner): Would that be it?

A. That will be it.

Mr. Resner: I will mark that "S-1."

Q. (By Mr. Resner): Now, I want to show you some other photographs, Mr. Spirz, and ask you to tell us if you recognize them and what they represent? A. That is a heavy lift barge.

Q. The barge in question in this accident?

(Testimony of Ted Spirz.)

A. I wouldn't know if that would be the barge in question, but that is the same.

Q. The same?

Mr. Resner: I might ask you, Mr. Harrison, we can [19] stipulate that this series of photographs which I now want to show Mr. Spirz are army barge B.D.-3031, which is the barge in question, and which pictures were taken by agreement between all the parties by the army photographer?

Mr. Harrison: That is correct. We all went out there and had the pictures taken.

Mr. Resner: All right, I will then ask that these various pictures be marked, if your Honor please. The first one shows the side view of the barge itself with the cabin.

Q. (By Mr. Resner): That is the cabin, Mr. Spirz? A. Yes, sir.

Q. And this is the—— A. Boom.

Q. Boom? A. Correct.

Q. It sits on the water alongside the ship?

A. Yes.

Mr. Resner: May this be received as libelant's next exhibit?

The Court: It may be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 8.)

Q. (By Mr. Resner): I show you a further photograph which shows B.D.-3031. Is that another view of the same vessel?

A. It is a view of a barge that the army has. [20]

(Testimony of Ted Spirz.)

Q. Looking in what direction, Mr. Spirz?

A. That is the boom this way (indicating).

Q. We are looking aft? We are standing on the bow of the barge? There is a boom coming up?

A. This is the forward portion.

Q. This is the forward portion of the barge?

A. Of the heavy lift barge.

Q. You see a house?

A. That is the cabin.

Q. That is the cabin up there in the upper left hand part of the picture where the operator is located? A. Yes, that is where the operator is.

Q. Therefore we are looking aft in this picture?

A. Yes, we are looking aft in the picture.

Mr. Resner: May it be received?

The Court: Yes.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 9.)

Q. (By Mr. Resner): I show you another picture and ask you what that is?

A. This picture is the boom—heavy lift purchase hook and the small left purchase hook, and when we load airplanes we use this smaller hook. This is the extra heavy lift.

Q. On the day in question this particular plane that you were loading was being held by which hook? [21] A. The small hook.

Q. The small hook? Do you want to draw a circle around that, Mr. Spirz? I will mark this

(Testimony of Ted Spirz.)

"S-1" and ask that this picture be received in evidence as libelant's Exhibit next in order.

The Court: It will be admitted and marked.

(Photograph referred to was admitted into evidence and marked libelant's Exhibit No. 10.)

Q. (By Mr. Resner): That is another photograph, Mr. Spirz, showing the name plate of the vessel itself—the barge itself, I should say, is that right?

A. Well, I wouldn't know about the name plate. I mean I never did see it on the barge, and though I had a lot of contact with the barge, I wouldn't know if it had it on the barge or not.

Mr. Resner: This may be received as libelant's exhibit next in order?

Mr. Harrison: No objection.

Mr. Kay: No objection.

The Court: Let it be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 11.)

Q. (By Mr. Resner): Now, Mr. Spirz, I show you another photograph and ask you to tell us what that represents?

A. I have never been in the cabin of this vessel, the barge, [22] in my life, but I presume that is what it is.

Q. The cabin? A. Of the heavy lift barge.

Mr. Resner: I think we can stipulate, Mr. Harrison, that is what it is?

(Testimony of Ted Spirz.)

Mr. Harrison: Yes.

Mr. Resner: We went up and sat in the seat ourselves, Judge. I offer this as libelant's Exhibit next in order.

The Court: It may be admitted and marked.

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 12.)

Q. (By Mr. Resner): This photograph I hand yon now, that depicts what?

A. Those are levers. I presume they are in the cabin of the heavy lift barge, though I never was in the cabin myself.

Mr. Resner: I might indicate to your Honor, you can see in this picture the lever to the left marked "auxiliary hoist" and one "main hoist," and another on the right is marked "boom hoist."

The Court: What does the evidence show in relation to the contact?

Mr. Resner: The auxiliary hoist, the one on the left in the photograph. May this be received as libelant's exhibit next in order?

The Court: No objection? It may be received and marked. [23]

(Photograph referred to was admitted into evidence as libelant's Exhibit No. 13.)

Q. (By Mr. Resner): I am going to ask you, Mr. Spirz, to tell us what time of day this accident occurred? A. Approximately around 11:30.

Q. 11:30? A. Yes, sir.

(Testimony of Ted Spirz.)

Q. In the morning?

A. Yes, 11:30 in the morning.

Q. Where were you stationed when the accident happened? A. I was on the catwalk.

Q. The catwalk of the tanker, Shawnee Trail?

A. That is correct.

Q. Can you go down to the model there and point out to Judge Roche just where you were standing at the time of the accident?

(Witness left the witness stand and went to the model.)

Mr. Resner: We need a pointer.

A. I was standing approximately right about here. I was watching the plane. Well, I was right on the right hand side of the nose looking beyond it. I was standing right about there (indicating).

Q. You were looking inshore? A. Yes.

Mr. Resner: If I had a ruler I could approximately picture the place. [24]

Q. We could do it by——

Mr. Kay: I have a ruler here.

Mr. Resner: You do have?

The Witness: I was standing approximately right—33 inches—approximately right here (indicating).

Q. That would put you 33 feet forward of the midship house? A. Approximately would.

Q. And somewhere between the thwartship beams, if we use No. 1 beam closest to the midship house, that would be Beam 1, Beam 2, forward,

(Testimony of Ted Spirz.)

Beam 3, Beam 4 and Beam 5, and Beam 6, being six beams on the model, 1 being the beam closest to the midship house, that would put you somewhere between Beams 3 and 4? A. Correct.

Q. On the catwalk looking port?

A. Correct, looking inshore, portside.

Q. All right. Was someone there with you on the catwalk?

A. I remember Mr. Rosenstock on the catwalk, and the whistleman Charlie. He was on the catwalk, and probably one or two stevedores, but I can't recollect who.

Q. Who is Mr. Rosenstock?

A. Why, he is in charge of the airplanes for the Army Air Corps, so far as I know. I don't really know his title, but he is in charge of all the airplanes, responsible.

Q. Did you see the plane coming over the ship?

A. Yes, sir. [25]

Q. Would you please describe to Judge Roche just what you observed as the plane was picked up on the barge and brought over the ship just prior to the attempt to land it?

A. Well, this is the inshore side of the vessel, so then you have the starboard side, and you have the heavy lift barges here.

Q. Water point. A. Into the water side.

Q. Pointing to the water side? A. Correct.

Q. That would be the starboard side?

A. Correct.

Q. Starboard side to the water?

(Testimony of Ted Spirz.)

A. Correct. And the heavy lift barge picked up the plane and he has to go quite high, as the house is here, and he brings it over the house, and the house fore and aft, whatever they consider, and we have tag lines, and we try to keep the plane steady from swinging, so that it won't hit a guy or stay or any portion of something on the house, and comes over and he gets it directly over on the inshore side.

Q. What height would he bring it over, Mr. Spirz?

A. I couldn't say exactly what height. I would say around 40 feet, 35 feet.

Q. High? A. Really up quite high. [26]

Q. All right.

A. Then when he gets it over on the inshore side he lowers away, the whistleman man in charge, he will lower away, and if he is close to anything his job is to stop or what, and he comes down very slowly.

Q. Go ahead.

A. And he brings it down until within our reach, where we can hang onto it and hold it and he blows his whistle.

Q. Let me ask you this: What kind of signals does this whistleman, Charlie, give to the man on the barge, do you know any of the signals?

A. I know a few of the common ones, some of the others that I wouldn't swear to, but like——

Q. Which ones do you know?

A. I know the ones like picking up a load he will blow once, once to stop at any time regardless

(Testimony of Ted Spirz.)

whether the lift barge hoist is up or down, it will always blow once; to lower will always blow twice. Other signals to stop, for lowering, for swing it, really I wouldn't know those, but I do know the common ones.

Q. What were you and Mr. Rosenstock doing on the catwalk?

A. Why, we—my job is to see that the tag lines are being held by my men and seeing that they are holding them the right way so the plane will not swing, and watching it, and directing my men, and then when you get over by these stays, [27] when you work inshore you still have to get your tag lines over them, and that is why the plane comes in so slowly, get the tag lines over, hold on to the tag lines and help get it down.

Q. Do you go through the stays?

A. No, past, over the stays.

Q. All right. What does Mr. Rosenstock have to do with that particular operation at that point?

A. He has nothing to do but just observe.

Q. I see. Well, now, does he tell you where to spot the planes?

A. Yes, he has a plan and we get it prepared, we get it ready before the plane comes in.

Q. Is that plan one developed by the Army?

A. Well, I think Mr. Rosenstock developed the plans.

Q. He is with the Army?

A. He is with the Army Air Corps, yes, sir.

Q. Now, Mr. Spirz, there are a couple of little

(Testimony of Ted Spirz.)

blocks here—your Honor, see them—what are these blocks used for?

A. Those are what we call a platform.

The Court: What?

The Witness: A platform.

The Court: A platform.

The Witness: That is for the landing gear where the wheel is, they have a tripod stand instead of the wheel, and [28] those are already on the plane on the barge when they bring it down, and we land, we put these platforms on these movable fore and aft beams.

Q. Could you describe to the Judge just what you do with them?

A. Well, you should have three, because you have three landing wheels, have one for the nose, up in here (indicating) there is a beam that is stationary that stays here and one stays here (indicating).

Q. Then that would be parallel to the catwalk?

A. Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock's plan he gives an idea just where those wheels will be.

The Court: Those are adjustable? Are they adjustable or when are they put on there?

The Witness: I don't understand.

Q. (By Mr. Resner): The Court says when are they put on?

The Court: When you are lowering the plane?

(Testimony of Ted Spirz.)

The Witness: The stand on the—no, these platforms are put on these movable beams.

The Court: Yes.

The Witness: And when the plane is in the right place.

The Court: Yes.

The Witness: Then if the stand of the wheel is here we [29] move the platform over.

The Court: They are adjustable?

The Witness: Yes, they are just a regular stand two men can handle.

The Court: All right.

The Witness: You can move it back and forth.

Q. (By Mr. Resner): And all the beams also adjustable so that they are moved to receive the planes in the proper place?

A. Oh, yes, just like this shows, that is just how they are. You can move them back and forth, but if you kick one harder than the other you have to straighten it out, and they are movable.

Now, the object is, you have to try and get as close as you can before the plane comes aboard the ship where this platform should be. So we get the plane where we can handle it and we move it to where we want it.

Then everything stops and we see where our platforms are. If they aren't right, we get under the plane and we have to move these movable beams just right—we have to put this platform exactly under that stand of the wheel. We have to be careful because we have to drill a hole on this, outside of

(Testimony of Ted Spirz.)

the beam, and another one on the inside, and on this side also, so after the plane is landed we have a carpenter come alongside that will drill a hole and put a U-bolt.

The Court: For the purpose of locking it? [30]

The Witness: To secure it, a regular iron U-bolt that comes up that takes washers and a screw and ties that platform down.

Q. (By Mr. Resner): That is secured around a movable beam into the wooden platform?

A. Into the wooden platform.

Q. And the plane is secured to these, three of these wooden platforms? A. Correct.

Q. The nose and the place where the two wheels are? A. Correct.

Q. Now, where are the longshoremen stationed during this loading operation of planes, Mr. Spirz?

A. Well, every plane that we land on the mechano deck is a little different and every operation the men will be in a different place. We have a few men down on the main deck to pass up these platforms.

Q. Pass up the platforms to the men?

A. Pass up the platforms to the men above to put on the movable beams. There may be one or two men on the catwalk, if the plane is ready to be hoisted, have them on the offshore side standing by waiting for the tag lines, and then as they get the tag lines they have to follow the plane and watch the plane.

(Testimony of Ted Spirz.)

Q. All right. And then there are some on the deck who hand up the little wooden platforms, hand them up to men on the [31] mechano deck?

A. That is correct.

Q. And there are certain men required to work on the mechano structure?

A. No, it is not necessary for certain men, it is just wherever they are at. If a man is on the mechano deck and the plane is being hoisted, he automatically will stop what he is doing and come over and be ready for the airplane.

Q. What I had in mind, does this operation entail some men working on the deck and some men up on top of the structure?

A. That is correct.

Q. What is the job of the men on top of the structure, that is, on the beams?

A. Their job is to take care of the tag lines, if they have any tag lines when the plane gets within reach and it is stopped, their job is to hold on to the plane to keep it from swinging, moving, just to steady it.

Q. All right.

The Court: You mentioned "tag lines" a number of times. They have to do with guiding on the plane?

The Witness: The tag lines?

The Court: What are they?

The Witness: They are very long lines, they are light, and attached to the stays of the airplane. When the heavy lift barge picks up the plane from

(Testimony of Ted Spirz.)

the barge the tag lines are [32] held out, control the plane from swinging.

The Court: That is what I am talking about.

The Witness: Yes. And we have to keep those lines, tag lines, taut so the plane doesn't swing into anything.

Q. Are those tag lines also used when the plane is brought down when he gets above the spot where you are going to land it?

A. They are then of no more use.

Q. You do use it for awhile and the plane comes down?

A. While it comes down until the plane is within reach.

Q. When the plane is within reach, then what happens?

A. Then the tag lines are forgotten, either the men will go to the wheel and he will take the tag line off and just let it go, and hang onto the wheel structure.

Q. Now, does this operation require the men to get their hands upon the plane physically?

A. When the plane is down close to the mechano deck and they can reach the landing gear, then that is what they do, they go over and grab ahold of the landing gear to keep control of the plane.

Q. And they do that for what purpose, Mr. Spirz?

A. So the plane will not swing and hit anything.

Q. And so that you can land it——

(Testimony of Ted Spirz.)

A. You have to hold on to it to land it exactly on this platform. [33]

Q. On the platforms? A. Yes, sir.

Q. Now, is the plane stopped at some point before the men take over with their hands?

A. Well, it is up 30 feet, the operator might stop it three or four times, or he might have it come all the way down until it is up to us to grab hold of it.

Q. And then is it stopped at that point before the men grab hold of it? A. Oh, yes.

Q. Now, did you see Mr. Luehr right before this accident?

A. Well, yes, when I was standing here (indicating).

Q. You said here, on the catwalk, you have indicated on the catwalk?

A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Leuhr standing over here by the stays, and we waited for the plane to come down, and when the plane stopped and we were ready to take over and hold onto it, I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

Q. Was he in a place where he was supposed to be, Mr. Spirz? A. Yes.

Q. That was his job there?

A. That is his job, to hold onto the plane and steady it. [34]

Q. Was he doing what he was required to do at

(Testimony of Ted Spirz.)

that particular time? A. That is correct.

Q. Now, I want you to tell his Honor in your own words as you stood on the catwalk just what you saw happen.

A. Well, when the plane stopped, Mr. Rosenstock and Charlie, the whistleman, three of us there, I had my hand on the nose of the plane, I always want to know when it stops moving, and Rosenstock and I agreed we should move it over a little bit more towards the house.

Q. That would be aft?

A. That would bring it aft. So Charlie was waiting for us, either I told Charlie or Mr. Rosenstock told Charlie, "Well, bring it over a little more," and Charlie said, "Okay," and he walked up this way for the reason this wing was close to the house and he was walking this way (indicating).

Q. When you say this way——

A. I mean——

Q. On the catwalk aft toward the house?

A. Toward the house. And he gave a signal, and he gave his whistles, and he stopped. And that is when all of a sudden the plane just dropped, and I had my hand on the nose, it just dropped while I was walking inboard, and I knew Mr. Luehr was over there and I actually saw what I think is the wing of the plane hit his left shoulder, ride him down, [35] and his head went down and his glasses flew straight out, up and out, and over he went and he landed on the main deck.

(Testimony of Ted Spirz.)

Q. Could you tell us with what speed the plane dropped?

A. Well, the only way I can describe is if you just cut the two falls, if you just cut the falls that was it, it just let go.

Q. Dropped like the falls?

A. Just dropped like, you know, the fall.

Q. Did the plane rest where it fell, or did it bounce or move?

A. The—when the plane hit, when it hit it hit with the fuselage, the belly of the fuselage, and it hit and it bounced.

Q. It hit the——

A. It hit the mechano deck and it actually bounced, and I would say, and I think it bounced a foot.

Q. Bounced back up?

A. Bounced and came back again.

Q. And then did you see, could you then see Mr. Luehr?

A. Yes, I saw Mr. Leuhr when the wing went down, and he was hit so hard that he fell over and he fell onto the main deck and right over here. He fell, he was possibly right in here (indicating).

Q. You have indicated a place approximately——

A. Right in here somewheres (indicating).

Q. Approximately the place, oh, perhaps 12 feet or so forward of the midship house on the port side? [36]

(Testimony of Ted Spirz.)

A. A little further, and I ran over this way, this here (indicating).

Q. "This way," meaning toward the house?

A. I ran aft towards the house and down the catwalk of the house here, and down the ladder, and I noticed when Mr. Luehr was laying in there, and his leg was twisted, I knew it was broke, how bad I didn't know, so I grabbed the upper part of his thigh, went down slowly and when I touched the bone that was protruding, just held his leg as straight as I could, and a couple of stevedores—he was complaining of pain, and he was in very great pain. I asked them to hold him steady and got—I asked someone to get a cot or something, and the Captain came and he gave Mr. Luehr a shot in the arm.

Then the ambulance driver arrived and they took over and he asked me to go to the hospital with them, and I did.

Q. You drove to the hospital?

A. I went in the ambulance with Mr. Luehr.

Q. You want to take the stand again for a minute, Mr. Spirz? You came back to the job somewhat later?

A. Yes, approximately an hour and fifteen minutes, or an hour and a half later. In Alameda they have a police car, police ambulance, and the officer was very kind enough to drive me back.

Q. Now, Mr. Spirz, I want to show you another photograph and ask you if you recognize that? [37]

(Testimony of Ted Spirz.)

A. Yes, that is the fuselage part of the plane that we loaded on the Shawnee Trail.

Q. And that is the fuselage that fell on Mr. Luehr?

A. That is the same type of a plane.

Mr. Resner: I am going to ask that this be marked first, and then I want your Honor to see it.

The Court: Admitted and marked next in order.

The Clerk: Libelant's Exhibit 14 admitted and filed in evidence.

(Thereupon the photograph above referred to was received in evidence and marked Libelant's Exhibit No. 14.)

Q. (By Mr. Resner): That is the fuselage that fell on Mr. Luehr? A. Correct.

Q. Let me show it to your Honor.

Those beams in the picture are similar, are they, Mr. Spirz, to the model over there showing the beams and the mechano structure?

A. That's correct.

Q. How heavy is that fuselage which fell on Mr. Luehr?

A. Well, we have loaded different jets and different gas engines—I think they even have the weight on this fuselage, but I don't remember now.

Q. Do you recall approximately what it was?

A. I couldn't really say what the approximate weight is, I [38] wouldn't like to, I might be too far off, so I wouldn't really——

Q. All right, Mr. Spirz. Now when you came

(Testimony of Ted Spirz.)

back to the job after taking Mr. Luehr to the hospital, did you meet the whistleman and the bargeman? A. Yes, I did.

Q. Where was it that you met them?

A. I met them on the dock. They were coming up from the water right towards the office that we used, and I met them on the dock.

The Court: Met who?

Mr. Resner: The whistleman and the crane operator.

Q. That is the man operating the crane——

A. Operating the crane.

Q. ——which dropped the plane?

A. Yes, and the——

Q. And Charlie, the man who gave him the whistle signals? A. Correct.

Q. Now, where was this job taking place, by the way, that was what place?

A. At Alameda, they call it, I think, ID 3.

Q. Was anyone else present there when you encountered these two men on the dock?

A. I think Mr. Rosenstock was there, and I encountered them on the dock.

Q. Did you gentlemen have a discussion there?

A. Yes, I asked the whistleman and the operator what happened, [39] and the operator spoke up and he says, he says, "I made a mistake; it is my fault." He says, "It was hot in the cab and I wanted to open the window, and as I did so my coveralls, my sleeve, caught the friction release and opened it

(Testimony of Ted Spirz.)

wide open, and before I could get it back, why, the damage was done."

Mr. Resner: Your witness, counsel.

Cross-Examination

By Mr. Harrison:

Q. You stated you had been connected with stevedoring since how long, since 1929?

A. The latter part of 1929.

Q. The latter of '29, with the exception of two years? A. Correct.

Q. How long have you been a walking boss?

A. Eight years.

Q. Eight years. How many—can you give us an estimate of how many tankers with mechano decks you have loaded in the course of your career?

A. Well, in the course of World War II, through there and up to this Korean issue, I'd say a couple dozen—24, 20.

Q. During the loading of these ships I understand you to say you direct your men where to work, do you not? A. Correct.

Q. No one else directs them or gives them any orders at all?

A. Well, the gang boss can tell them what to do. [40]

Q. Was there a gang boss on this job?

A. Yes, there was.

Q. What was his name?

A. His first name is Martin, I don't recall——

(Testimony of Ted Spirz.)

Q. Ingelbretson?

A. It could be, I couldn't recall.

Q. Do you know of your own knowledge, or can you give us an estimate, Mr. Spirz, of how high it is from the top of those, one of those fore and aft beams to the main deck of this vessel?

A. The movable fore and aft beam?

Q. Yes.

A. Approximately 7 feet, 7 foot 2 inches, 7 foot 6 inches, around that distance.

Q. Now, how wide is one of the fore and aft beams? A. Six inches.

Q. How wide is an athwartship beam?

A. Ten inches.

Q. Ten inches. Can you tell me, Mr. Spirz, you say that the men on the main deck handed these platforms up to the men on the mechano deck. Who built those platforms, do you know?

A. Mr. Rosenstock ordered them through the Army to have them to be built, they were built by the Army.

Q. Were they built on or around them?

A. No, they were built, I presume, in the Oakland Army base [41] and brought to Alameda, Army Base at ID3.

Q. I see. Now, referring again to these tag lines, these tag lines are not on the airplanes when they come down the river from Sacramento, are they?

A. No, sir.

Q. And you say that one of your stevedore men or two of your stevedore men put the tag lines on

(Testimony of Ted Spirz.)

the planes as they came out of the barge, is that correct?

A. Sometimes they did, and sometimes they didn't. We had some men from up in McClellan field I call "doctoring." In other words, any plastic that was off the plane, they had to do any mechanical work to the fuselage, these men from Sacramento, who were qualified for it, they did that work, and sometimes they did all the hooking on and put the tag lines on. If they didn't have enough help, I sent my dock man out there to help.

Q. Do you recall whether or not any of your own dock men did do this?

A. I think they were——

Q. You think there were some of your own men, employees of Jones, out on the barge?

A. There could have been.

Q. Now, when the plane has been raised and begins to come over the deck of the vessel, where do the men stand when they handle these tag [42] lines?

A. Well, they have to go to the offshore side of the vessel first on the mechano deck, or maybe one on the catwalk, but you have to get over to the offshore side to get the tag line from the heavy lift barge from the men on the barge, they keep it taut, and as the plane comes over the ship, then the tag lines—so then the men will reach out and grab the tag lines and take over.

Q. Now, do they stand on the mechano deck to do this? A. They do.

(Testimony of Ted Spirz.)

Q. You mean they reach out over from the top of the mechano deck over the side of the vessel to receive one of these tag lines?

A. They've done that, they reach out from the edge of the mechano deck and grab the tag line.

The Court: How, reach it from the catwalk?

The Witness: I mean there would be a stevedore at the catwalk waiting to help as the plane came over. That is the fore and aft stays.

Q. (By Mr. Harrison): Now, why don't you stand on the main deck and guide these tag lines in?

A. Because it is impossible to guide these tag lines, those movable beams, fore and aft beams would stop you.

Q. Wouldn't it be possible to pass them over each beam as you came to them?

A. Then you would slacken off your tag line and then you [43] wouldn't know what happened to your plane.

Q. It would be impossible to keep this on the tag line and still pass it over those beams?

A. That's correct.

Q. Mr. Spirz, is it proper stevedoring practice for men to stand or work beneath a suspended load?

A. Are you talking about a load of airplanes?

Q. I am talking about general stevedoring practice.

Mr. Kay: Just a moment. Your Honor, I am going to object to that as incompetent, irrelevant and immaterial. That is just the point, we are not concerned with certain types of loads, concerned

(Testimony of Ted Spirz.)

with an airplane, and proper, customary practice as to that is the proper question.

The Court: General practice wouldn't help us bring us to the scene of this and the physical outline.

Mr. Harrison: I was trying to get to what this man considers a safe practice, your Honor.

The Court: Under the circumstances existing.

Q. (By Mr. Harrison): Let us ask you this question, then, Mr. Spirz: When assisting to steadying a sling load, such as one of these airplanes, either in hoisting it or landing it, is it a good safety practice to allow men to stand in the line of travel of that load?

A. It depends on how high the load is.

Q. Well—— [44]

A. If you give me a distance I can help.

Q. Would you say it was proper to allow a man to stand under a suspended load ten feet above his head?

A. No, because he couldn't control the airplane, he couldn't reach it. If he can reach, when he can reach the plane, then it is permissible to get under it.

Q. Now, when it reaches the uppermost part of your reach, is it proper for him to stand underneath the load to help steady it?

A. Well, he doesn't go underneath the load, then when it gets within a reasonable reach, where he can go out and reach that landing gear or that tripod, then he has to go underneath that ring and

(Testimony of Ted Spirz.)

he is partially under that plane, yes, he has to do that.

Q. And you consider that a good safety practice to allow a man to stand either in the travel of the load or underneath the load?

A. It is not whether you think it is good practice or not, you can't land that plane unless you get under it.

Q. You think that is a dangerous practice?

Mr. Kay: Just a moment. Your Honor, I object to that as incompetent, irrelevant and immaterial. That is relative to whether or not all stevedoring is dangerous, to a certain extent, and improper to ask this witness that question.

Q. (By Mr. Harrison): You think it is comparatively dangerous? [45]

Mr. Kay: Same objection, your Honor.

The Court: I will allow him to answer.

The Witness: In which way are you referring, the work being dangerous?

Q. (By Mr. Harrison): What you term a necessity of men standing underneath a suspended swingload or in the line of travel of a load?

A. You mentioned suspended; you mentioned swinging——

Mr. Kay: Your Honor, again that is a compound question, getting away from the question that he asked to which I objected.

Mr. Harrison: I asked the man if it was dangerous for one to stand underneath a load when it is suspended. I will ask again:

(Testimony of Ted Spirz.)

Q. Is it dangerous?

Mr. Kay: Just a moment.

The Court: He has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous.

The Witness: That is correct.

Q. (By Mr. Harrison): That is correct?

A. Yes.

Q. The way you consider it is necessary to lower these planes, you also consider it dangerous, is that correct? [46]

A. I consider it dangerous to a certain extent if the load falls, you're under it, you have to get under it to land that plane, have to be underneath it, have to hold that tripod and three stands, and under that plane, hold on to the tripod, and it is suspended, if something happens, you are under it, and that is it. [47] But you can't land that plane by standing ten feet away. You have to hold on to that stand.

Q. Let us get to what you think is dangerous, Mr. Spirz. Would you say it is a good safety practice to allow, say, a man to stand next to an open hatch near a suspended load?

Mr. Kay: Just a moment, your Honor. I object to that as entirely incompetent, irrelevant and immaterial, has nothing to do with the direct examination, improper cross-examination. In the first place, he wasn't produced here as a safety expert, to be sure he has worked at the business, knows about

(Testimony of Ted Spirz.)

those things, but even in that regard this question is so far from the issues here he is talking about an entirely different thing.

Mr. Harrison: Your Honor, please, this man has testified he has been eight years a walking boss, four years as a stevedore, and I think it is very relevant in this case to determine what this man considers a safe practice and how he carries on his operations. Now, I am asking him a very simple question, whether or not he would consider it a safe practice to allow a man to stand next to an open hatch when there is a swinging load——

Mr. Kay: Just a moment, your Honor.

Mr. Harrison: I will be able to tie this up by comparing it to an open hatch to one of these mechano decks.

Mr. Kay: Then he should ask him about this mechano deck, [48] that is what we are concerned with here. That is going around to the back door.

Mr. Harrison: Your Honor, please, I wish to conduct an analogy to the practices which were carried on here and specific practices which are covered by the stevedores' own safety code.

The Court: I see what you are trying to get at, but we have no hatch here.

Mr. Harrison: I agree with that, your Honor.

The Court: Open hatch.

Mr. Harrison: I was intending to ask the witness if this doesn't present the same or comparatively dangerous condition as an open hatch would.

The Court: Ask him the direct question; he is an expert.

(Testimony of Ted Spirz.)

Mr. Harrison: All right.

Q. Mr. Spirz, I will repeat the question. Would you say it was good safety practice to allow men to stand near an open hatch near a suspended load?

Mr. Kay: Pardon me, our objection is noted to that?

The Court: The record will note the objection.

A. Now, you are talking about an open hatch. What type of a load are you talking about?

Q. (By Mr. Harrison): Well, let us say we are bringing aboard a deck load of cranes, airplanes, anything, and there happens to be an open hatch on that deck, you are intending to [49] land the deck load on the main deck of the vessel, would it be a safe practice to allow a man to stand between the travel of that load and an open hatch?

A. It is a safety rule, if you are going to land a load on the deck, you have to cover up the hatch, so you won't have an open hatch if you are going to put it on the deck.

Q. That would be a very unsafe thing to do, the safety rule prohibits it?

A. I just stated that you would have to close the hatch.

Mr. Resner: I am going to object to this, completely irrelevant, and not proper cross-examination. It has no relationship to this case.

The Court: I tried to indicate the conditions existing. The question you suggested to the witness here—I was liberal enough—but the conditions that

(Testimony of Ted Spirz.)

you recited has no relation to our problem here, as I take it.

Mr. Harrison: Well, I will drop that line of questioning. I thought it would be quite easy to compare the danger a man is exposed to standing next to an open hatch, and the danger he is exposed to while standing on one of these beams.

The Court: No relation to the conditions existing here thus far, unless we run into a hatch that is open, or something. I say that kindly and advisedly.

Q. (By Mr. Harrison): Mr. Spirz, as a walking boss of a stevedoring gang, is it one of your duties to look after the [50] safety of your men?

A. Yes.

Q. Now, would you agree that walking around on a six-inch movable beam some eight feet above the main deck of a vessel and swing a load is a comparatively dangerous operation?

Mr. Kay: Just a moment, your Honor. Again, there is no evidence and there hasn't been by this witness, and I don't suppose we are even going to get that kind of evidence with this thing, that there was any swinging load at all. I object on that ground.

Q. (By Mr. Harrison): Was the load landed, Mr. Spirz, at the time this accident happened?

A. Was the airplane landed?

Q. Yes. A. No, sir.

Q. Was it swinging? A. No, sir.

(Testimony of Ted Spirz.)

Q. Was it suspended by a single hook on a bridle?

A. It was suspended by a purchase hook that has two parts. What I mean by two parts, the fall went from the standing part of the boom down through the shiv and up, there was two parts on that hook which we, in stevedore terms, call two parts.

Q. I see. [51]

A. And it was suspended in the air.

Q. It was suspended? A. Yes.

Q. Why was it necessary for the men to have their hands on it?

A. To steady it from swinging.

Q. Then it would have swung if they did not have their hands on it?

A. It will swing if the wind hits it, or if the heavy lift barge moves or shifts. When ships go through the estuary the movement of the vessel, it will tend to make that plane swing, so we hold on to that tripod or that landing gear strut to steady that plane so nothing, the wings especially, won't hit any part of the ship.

Q. I see. Now, I will rephrase the question. Would you agree that walking around on a six-inch wide movable beam eight, seven to eight feet above the main deck of the vessel in the vicinity of a load which has a tendency to swing is a comparatively dangerous operation?

Mr. Kay: Your Honor, I am going to object, and I don't like to keep doing this—here is my

(Testimony of Ted Spirz.)

point: The evidence here is not that anybody was walking around, and as a result of that—or not even going to be evidence to that effect as a result of walking on a six-inch beam this man was injured. This man was standing on the beams there, not the [52] six-inch beams, your Honor, that is a ten-inch beam and standing in that position, and he wasn't walking, so this question would be improper, incompetent, irrelevant and immaterial.

Mr. Harrison: I will change the question, "walking" to "standing" to suit you, Mr.——

Mr. Kay: And on a ten-inch beam.

Mr. Harrison: Mr. Spirz has testified they are eight inches.

The Witness: Pardon me, you misunderstood me. The movable beams are six inches, the athwartship beams, they are firm and secured, are ten inches.

Q. Ten inches? A. Yes. [53]

Mr. Harrison: Well, I would still like to get an answer to this question, if the Court please:

Q. (By Mr. Harrison): Do you believe that standing on an eight-inch beam, seven to eight feet above the main deck of a vessel in the vicinity of a load which has a tendency to swing is a comparatively dangerous operation?

Mr. Kay: I object on the ground there is no evidence, won't be any evidence, this was an eight-inch beam.

Mr. Harrison: Ten-inch, pardon me.

(Testimony of Ted Spirz.)

Q. (By Mr. Harrison): With that amendment can you answer the question?

A. That is a ten-inch beam you are talking about?

Q. That is right.

A. The job—to load that plane you have to get under it. There is no other way.

Q. I am asking you—I am admitting that that is the way you did the operation. Do you think it was a dangerous operation?

A. Well, I have been under that plane—those planes, many times, and if I thought it was that dangerous I think I would refuse the job, so I would say it isn't a dangerous job. But that job has to be done that way. There is no other way. You have to get underneath the plane to hold the tripod to land it. If I thought it was dangerous—I am under it myself—I would not take the job. I would refuse [54] it.

Q. You don't think it is dangerous at all?

A. To some extent. There is danger in any stevedore work.

Q. Isn't there danger of falling?

A. From the rig?

Q. Yes.

A. Not for any of my men. I never made a report on any of my men.

Q. I am asking you if there isn't danger of falling?

A. Is there any danger of falling off of it?

Q. Yes.

(Testimony of Ted Spirz.)

A. There is danger in anything that a person might fall off of, yes.

Q. You don't know exactly how heavy those planes are, do you? A. Not exactly.

Q. But they are over a ton?

A. I am quite sure they are over a ton.

Q. You don't think with a weight as heavy as a plane, which has a tendency to swing, could very well knock one of the men off?

A. No, it isn't that dangerous.

Q. You don't think an airplane swinging on a hook will strike a man, may knock him off a ten-inch beam?

A. I am holding onto the strut, the landing gear of the [55] plane, myself. This will stand a very good gust of wind. I have done that. It isn't much to hold that fuselage, doesn't take much effort, but you have to hold onto that tripod and steady that plane. You don't need that here. It won't swing that far, knock a man over. It wouldn't never do that.

The Court: Take a recess for a few minutes.

(Short recess.)

Mr. Resner: Judge, Mr. Harrison has very kindly consented to allow me to withdraw Mr. Spirz for a minute or two and put on Mr. Paul of the Longshore Labor Relations for the purpose of proving the amount of port hours that were available during the period of Mr. Leuhr's disability.

The Court: Very well.

(Testimony of Ted Spirz.)

Mr. Harrison: I suggest you obtain Mr. Kay's consent, too.

Mr. Resner: Will you agree, Mr. Kay?

Mr. Kay: Absolutely.

Mr. Resner: Will you, Mr. Cooper?

Mr. Cooper: I didn't understand what you are asking.

Mr. Resner: Just to withdraw Mr. Spirz long enough to put on Mr. Paul, who is a member of the port Labor Relations, to prove the port hours during the period of Mr. Leuhr's disability.

Mr. Cooper: All right. [56]

(Witness excused.)

LESTER RICHARD PAUL

called as a witness for the libelant, sworn.

The Clerk: State your full name to the Court.

A. Lester Richard Paul.

Direct Examination

By Mr. Resner:

Q. Mr. Paul, state your name, please.

A. Lester Richard Paul.

Q. Your address?

A. 470 Vermont Avenue, Berkeley.

Q. Your occupation?

A. I would be considered a statistician down there.

Q. Who is your employer?

A. The Labor Relations Committee, or the Pa-

(Testimony of Lester Richard Paul.)

cific Maritime Association and Local 10 of the I.L.W.U.

Q. Pacific Maritime Association and the Longshoremen's Local—— A. That is right.

Q. ——Union Local 10, San Francisco?

A. That is right.

Q. You are the chief clerk?

A. That's right.

Q. What does your job entail, Mr. Paul?

A. Well, it entails the keeping of statistics, of the hours [57] worked by gangs.

Q. Directing your attention to the period commencing on July 31st, 1950, and continuing through to December 31st of 1951, during that period of time how was the work apportioned between the longshoremen in the port?

A. Well, the hours are set weekly, or were set weekly during that period by the Labor Relations Committee. In other words, they generally decide about how many—about how much work was going to be performed in the port.

The Court: How are they able to find that?

A. They went by the previous work of previous weeks. In other words, they would—say a forty-hour week, they would estimate that would be the amount of work that would be available; then in the event there is a week of work—an increase of work, say, about Monday or Tuesday, they would decide on an extension and allow ten hours more for the work.

Q. (By Mr. Resner): In that way were the

(Testimony of Lester Richard Paul.)

hours fairly apportioned between the longshoremen during that period of time?

A. Yes. We found that over a period of a year, why, it generally equalized out generally according to their estimate.

The Court: Do you have any difficulty at all serving both of those?

A. No, I don't think I do.

The Court: You are the first gentleman that has appeared [58] here that didn't have some difficulty down on the waterfront.

A. I am supposed to be neutral.

The Court: That is the reason I asked. You are supposed to be neutral. Keeping in mind the human element, I thought you had some job there. I didn't know. That is the reason I asked.

Mr. Resner: They have apportioned the work, Judge, as you know, during these years.

Q. (By Mr. Resner): Mr. Paul, you appear here pursuant to subpoena? A. Yes.

Q. That required you to produce certain information? A. Yes, sir.

Q. Did you bring that information with you?

A. Yes, sir.

Q. Will you bring it out? Have you got that in your pocket there? A. Yes.

Q. You have handed me some records here.

Mr. Resner: Mr. Harrison, and Mr. Kay and Mr. Cooper, do you gentlemen want to look at those? (Handing documents to counsel.)

Q. (By Mr. Resner): Those are from the offi-

(Testimony of Lester Richard Paul.)

cial records of the Longshore Labor Relations Committee for the years 1950 and 1951? [59]

A. Yes.

Q. Showing hours available and the rates of pay, is that right, Mr. Paul? A. Yes, sir.

Q. From what period of time to what other period of time does what you call the port year run?

A. Well, according to the time sheets I have submitted, why, the dates are as shown.

The Court: Subject to any correction that may be made, is there any objection, gentlemen?

Mr. Kay: I have no objection, your Honor.

Mr. Resner: Do you, Mr. Harrison?

Mr. Harrison: You aren't going to admit that in evidence?

Mr. Resner: I am going to offer in evidence, not the originals, but exact copies thereof, of the port hours for the period August 1st, 1950, to December 23rd, 1951, your Honor, and the rates of pay for those periods as taken from the official records.

Mr. Harrison: We will definitely object to that, your Honor. The hours that were available have absolutely no relationship to how many hours this particular man, Mr. Leuhr, would have worked.

Mr. Resner: He would have earned more.

Mr. Harrison: His past record is probably the best indication of his earning ability and his working habits. [60] I assume Mr. Leuhr is going to take the stand. We can determine from them his past earnings. The earnings in the industry have absolutely no relation to what Mr. Leuhr may or

(Testimony of Lester Richard Paul.)

may not have done had this injury not occurred. It is entirely too speculative and I submit it isn't proper.

Mr. Resner: The trouble with Mr. Harrison's argument or objection is that it does not apply to this industry, Judge, because a longshoreman is entitled to work all the hours that are available. The work is distributed amongst them, and Mr. Leuhr will testify that for a year or two or three before his accident he worked all the time that was available to him to work.

But it shows, nonetheless, your Honor, that in the twenty months he has now been disabled he had available to him an equal work opportunity with every other man on this waterfront. And I know of no better way for him to prove his wages, your Honor, during the twenty months than to show how to determine exactly within a few dollars, of what his fellow workers have earned; and as an indication, further, your Honor, of what the earnings are in that industry projected into the future of his life expectancy, which will, of course, be a vital element of damages.

Mr. Harrison: Your Honor, please, if Mr. Resner would produce the same records covering the war period, wherein I assume even greater hours were worked, and compare those to [61] Mr. Leuhr's actual earnings, then we would probably have no objection. However, now there is no relationship between hours available and Mr. Leuhr's actual earnings.

(Testimony of Lester Richard Paul.)

We suggest as a matter of argument, your Honor, that there were more hours available during the periods when Mr. Leuhr was able to be employed, and we have his earning record at that time, and the earning record must be compared with the hours available during that period.

The Court: Why couldn't the Court consider both?

Mr. Harrison: I believe with consideration of both of those things it would probably be proper, your Honor. But I suggest if Mr. Resner wants to produce this witness, he might produce the whole story.

The Court: Objection overruled. Proceed.

Mr. Resner: All right, Judge.

Q. (By Mr. Resner): I will show you, then, Mr. Paul, work records which have been brought up here, and ask you if they are exact copies of official records showing the port hours available and the rates of pay during the periods of time I have questioned you concerning?

A. Yes, that is the official records.

Mr. Resner: If your Honor please, I am going to offer these into evidence as one exhibit, if I may. There are three sheets of paper. One of them is a carbon copy.

(Official records referred to were admitted into evidence [62] as libelant's Exhibit No. 15.)

Q. (By Mr. Resner): Now, so that when you are gone, Mr. Paul, his Honor and all the lawyers

(Testimony of Lester Richard Paul.)

here will be able to understand this, I want to go over this.

The Court: Is there any way of giving it briefly in a digest form?

Mr. Resner: It is on here, but I want to indicate what they are—what the red and black figures are.

The Court: Very well.

Q. (By Mr. Resner): On each little square is a figure in black. What does that indicate?

A. That is the port hours for the week.

Q. And we see a figure in red in some of the squares. That indicates what?

A. That is an extension of port hours. In other words, if the work opportunity is greater than the hours specified we add it onto the port hours. In other words, an extension of hours.

Q. The line at the bottom——

A. Will be totals.

Q. Will be totals? A. Totals.

Q. So each figure at the bottom here on the left-hand side of the column will be totals?

A. Yes, that is the totals. [63]

Q. And the first sheet is for the year 1950?

A. That is right.

Q. The back of that sheet is for the year——

A. Continuation. Ran through up until the end of the period of the year.

Q. Which occurred when?

A. In this case here, December 24th for the year 1950.

(Testimony of Lester Richard Paul.)

Q. 1950? A. Yes.

Q. Then we have the second sheet here?

A. That starts out with beginning of the 25th of December.

Q. And it runs through until?

A. Until December 23, inclusive.

Q. Of 1951? A. 1951, that's right.

Q. Now, the rate of pay in the latter part of 1950 is shown here to be what?

A. Shown here on this original sheet as of the 30th of September, the rate changed.

Q. Well, so that we will understand, the rate of pay from September 30th—no, December 6th, 1948—— A. September.

Q. September 30th, 1950, was $1.82 an hour?

A. For the straight time.

Q. For the straight time. $2.73—— [64]

A. $2.73. Those are the Pacific longshore rates.

Q. On top of those there are certain penalty rates, five cents or ten cents an hour?

A. Some get ten cents more an hour.

The Court: Penalty for what?

Mr. Resner: Noxious cargo: Bombs, dynamite, explosives, acids.

Q. (By Mr. Resner): I see here, Mr. Paul, that the rate changed again at what date?

A. On September 30th.

Q. 1950, changed to $1.92 straight time and $2.48——

A. Eighty-eight cents overtime. $2.88.

Q. The rate changed again?

(Testimony of Lester Richard Paul.)

A. The rate changed again on June 18, 1951.

Q. And when to $1.97? A. That's right.

Q. Straight time. $2.95 was overtime?

A. That is right.

Q. And that is the current rate of pay?

A. That is the current rate of pay.

Q. And you have on the right-hand side of the first sheet, for the period August 1, 1950, to October 1st, 1950, there were 470 port hours at $1.82, totalling earnings on the port hour basis of $855.40 for that period? A. That is right. [65]

Q. Then for the period October 2nd, 1950, to June 18, 1951, there were 1,600 port hours at a rate of pay of $1.92 an hour, making total earnings for port hours $3,072? A. That is right.

Q. Then June 18th, 1951, to December 23rd, 1951, there were 1,240 port hours at $1.97 per hour, meaning port hour earnings in the amount of $2,442.80? A. That's right.

Q. Now, since December 23rd, 1951, what are the systems whereby the work is made available to the men?

A. Well, they have a "low man out" system.

The Court: A what?

A. "Low man out." In other words, if a man is low in hours, he is sent out on that basis. He will have priority against the man who is high. The low man out will go first. He has priority.

Q. (By Mr. Resner): In other words, if there is a man, say, has fifty hours of work and another

(Testimony of Lester Richard Paul.)

man has thirty, the man who has thirty can work until he catches up with the man who has fifty?

A. They file each individual's there, the hours that they have worked the previous week when they start out a new week.

The Court: Tell me, who makes that determination?

A. The man himself. He knows what he has worked the previous week. [66]

The Court: That is a record?

A. That is a record, and each man signs that record.

Q. (By Mr. Resner): Since December, 1951, and for the past three and a half or four months, Mr. Paul, can you tell us what the average earnings of longshoremen have been?

A. I couldn't say definitely.

The Court: Approximately.

A. An approximate figure, just of all the figures that have gone through my mind, I would say the average longshoreman is earning around $100 a week.

Mr. Resner: I think that is all, Mr. Paul.

Cross-Examination

By Mr. Harrison:

Q. Just a second here, Mr. Paul. Did you keep records similar to those for the year 1948?

A. 1948? Let's see, there was a period in there—I have forgotten just when—when we didn't record the port hours, but I have kept all the port hours ever since they started.

(Testimony of Lester Richard Paul.)

Q. Then you have a similar record to that, but one covering the year 1948?

A. Yes, I have the records. Whether during that period we kept them I don't know definitely. I would have to find out. Whatever it was, I have the records, yes.

Q. Do you have records covering 1949?

A. All the port hours that have ever been kept I have a record of regardless of the year. [67]

Mr. Harrison: Your Honor, please, we would like to have those records produced.

Mr. Resner: All you have to do is issue a subpoena, Mr. Harrison.

Mr. Harrison: I thought perhaps Mr. Paul would agree to bring the records, to save time. I think they are necessary.

Mr. Resner: We have no objection.

A. They are identically the same as these records. We kept them the same way, whatever were kept, I would have that.

Q. (By Mr. Harrison): Will you bring those tomorrow, Mr. Paul? A. Yes, sir.

Q. And a record of what Mr. Leuhr was making at the time he was injured?

A. No, I haven't any record of that. There was a time when we kept the individual records of hours only.

Q. You can't give me an estimate of what Mr. Leuhr himself was making at the time he was injured? A. No.

Mr. Harrison: I think that is all.

(Testimony of Lester Richard Paul.)

Mr. Resner: Then if you will, bring them tomorrow morning, will you, please, Mr. Paul?

A. Yes.

Mr. Resner: Do you want anything else?

Mr. Harrison: 1948 and 1949. If you have any individual [68] records on Mr. Leuhr we would like to have them.

Mr. Resner: What period?

Mr. Harrison: 1948, 1949, 1950.

A. No, I haven't any individual——

Mr. Harrison: After 1950?

A. No.

Mr. Resner: All right, thank you, Mr. Paul. We will see you tomorrow.

(Witness excused.) [69]

Mr. Harrison: Will you call Mr. Spirz for further cross-examination?

Mr. Resner: Yes.

(Mr. Spirz, recalled as a witness for the libelant, resumed the stand.)

TED SPIRZ

Cross-Examination
(Continued)

By Mr. Harrison:

Q. I think we finally agreed, Mr. Spirz, that this operation which we have described was, had inherent dangers in it?

(Testimony of Ted Spirz.)

A. Well, all stevedoring work has their danger points. Just what do you mean by danger?

Q. Well, possibility of injury.

A. In all stevedoring work there is possibility of injury.

Q. Would you say that working on this mechano deck had more possibility of injury than working on the main deck? A. I would say that.

Q. Then it is a comparatively dangerous operation as compared with other operations of stevedoring?

A. I don't—we handle steel, and I'd say that is more dangerous than a mechano deck any day.

Q. But this is more dangerous than, say, loading bags of coffee into the hold?

A. That is correct.

Q. Or just loading ordinary deck cargo? [70]

A. Correct.

Q. It is more dangerous than that?

A. Correct.

Q. Now, recognizing that this is a situation which would have, as we say, some dangers which are a little out of the ordinary, anyway, wouldn't you agree to that it is a little more dangerous than an ordinary stevedoring——

Mr. Kay: Your Honor, I object to that, he has asked and it has been answered, and quite effectively, I think, for everybody's benefit.

The Court: Well, you just got through with coffee, getting under coffee. There is a degree of danger in an activity of this kind that would be

(Testimony of Ted Spirz.)

hard to make a determination. It would be remote even as far as the law is concerned, if I have any conception of the problem.

Mr. Harrison: However, I think that we can, just in looking at that structure, see it would be more dangerous to try to load cargo in this situation.

The Court: If you were a longshoreman, if you didn't like to go on that, if your job was at stake, that is the other side of it.

Mr. Harrison: That is true, your Honor, but your Honor's very observation would lead us to believe that there would be a possibility maybe a longshoreman would object to working on top of that structure. [71]

The Court: Did you know of any?

The Witness: No one refused to work on the top of the mechano deck that I know of. Every man that came on the job, they never refused, they never even mentioned it.

Q. (By Mr. Harrison): Well, in all stevedoring operations aren't there some required safety precautions?

A. Yes, it depends on the type of cargo.

Q. Well, what safety precautions did you take to avoid injury to these men?

A. Only safety precautions I take is when the plane is up 30, 40 feet, not necessary to stay underneath, and you have your tag lines, either forward or aft, until the plane gets down, until you have to get right at the level, reach, and you have to get it,

(Testimony of Ted Spirz.)

and have to hold on to the plane, then you go under the plane.

Q. But you say that you prefer not to allow the men to stand under it until it has been reached?

A. That is correct.

Q. Why don't you allow them?

A. Because it isn't necessary. Why jeopard—should anybody go under a load they don't have to.

Q. What you started to say, is why jeopardize the men, is that correct?

A. Yes. If I saw a man walking on the catwalk as the plane was coming and it wasn't necessary for them to be there, I [72] would tell them to get out of there.

Q. Standing under a load does jeopardize a man?

A. It does when it is not necessary. If it is necessary to get under a load, then there is nothing you can do about it.

The Court: The distinction here is the necessity of getting under it.

Mr. Harrison: I am going to get to that, your Honor.

The Court: Pardon me.

Mr. Harrison: That is not the case.

The Court: Well, all right. I am only following his testimony, trying to; that is all I am trying to do.

Q. (By Mr. Harrison): The only safety precaution then you took was not allowing the men to

(Testimony of Ted Spirz.)

stand under a load while suspended 30 feet in the air?

Mr. Resner: That I object to as assuming something not in evidence, that isn't what the witness testified to, Judge.

Q. (By Mr. Harrison): What was your testimony as to the question what safety precautions did you take to avoid injury to these men during this operation?

A. Well, on all the mechano decks I have loaded I have had no accident up until this one, and I took precautionary measures when they came up. I just can't recall what precautionary measure I should take now. If you have a man doing something wrong you have to explain it. Thus a man has to jeopardize himself and I would have to see him jeopardize himself. If he [73] wants to do a toe dance on the mechano deck, I would stop him, anything he would do that was wrong, and the stevedores have been down there quite a while, they watch themselves.

Q. But your testimony is you took no safety precautions?

A. Always did take safety precautionary measures.

Q. What safety precaution did you take?

Mr. Kay: Just a moment. This is assuming that the man has testified, or that there was some safety precaution to take and he didn't take it. He just got through saying if he saw anything, had anything requiring his directing the men to take safety precautions, he would do so.

(Testimony of Ted Spirz.)

Now, obviously this witness has testified that there wasn't anything they did that was wrong, and therefore he didn't have to take any. That is the answer. He is trying to have the witness admit something that didn't exist here.

Mr. Harrison: Mr. Kay, here, your testimony is appreciated.

Mr. Kay: Well, it is an objection, your Honor.

The Court: Read the question.

(Question read by the Reporter.)

The Court: You may answer.

A. I took all the safety precautionary measures that were possible at that time.

Q. Name a specific safety precaution.

A. Well, I named one, only that if a man was going to walk under the plane when it was coming across the deck of the house [74] of the ship and it wasn't necessary for him to do so, I would tell him, stop him, get him out of there. That is a safety precautionary measure.

Q. That is admitted. Did you take any others?

A. If any came up that I don't remember—on the mechano deck there isn't, I didn't have to take any safety measures, the men know their safety measures themselves.

Q. Did you request at any time walking boards for the men to walk about on the mechano deck?

A. Walking boards?

Q. Yes, some sort of scaffolding or planks.

A. On top of the mechano deck?

(Testimony of Ted Spirz.)

Q. To be anywhere to give them better footing.

A. No, sir.

Q. Do you know whether or not such boards were available for your use in that vicinity?

A. Planking, available for me?

Q. Yes.

A. I don't know if they were or not.

Q. You don't know whether or not in this specific instance there was planking available for your use should you have chosen to use them?

A. If I chose to use planking, I can get all the planking from the Army I want but I wouldn't choose for planking.

Q. But if you did so choose, there was planking available? [75] A. Correct.

Q. Correct. Now, why didn't you use planking?

A. It isn't practical; you can't use planking.

Q. Why can't you use planking?

A. Because you have movable beams, that is, the mechano deck, you have to move the beams.

Q. Isn't it possible, when time to move the beams, you could also move the walking boards?

A. Are you talking about planking or walking boards?

Q. Planking. A. Would you repeat that?

Q. Isn't it possible when the time came to move the beams that if the planking were in the way you could move the planking?

A. Well, then it is the same, if you have your planking on your mechano deck and you bring your plane down and you have your three stands, and

(Testimony of Ted Spirz.)

the plane is in position to land and you have your planking there you have to move the plank.

Q. Yes.

A. But you can't move the planks because the plane's in your way. You hoist the plane up and put it on the barge, don't do any good, the planks are in your way. [76]

Q. Now, you move the beams when the plane comes down? A. Yes.

Q. Why not move the planks, if they are in your way? You don't have to put the plane back on the barge to move the beams?

A. You still have to get under the plane, and if the planking is there we have to get the planking all off the movable beams. May I show you what I mean? May I describe it?

The Court: Go ahead.

(Witness at the model.)

The Witness (Continuing): Have you any pencils or something for planking?

Now, if I were to—I wouldn't use planking, but if I did, I would use it this way. Now, you have a stand here and a stand here and a stand here (indicating). Then you can't use planking here at all.

Q. (By Mr. Harrison): Wouldn't it be possible to use planking this way and provide a place for the men to stand here, could still put their hands on the plane and perform the steadying operation by touching the wings without standing underneath the airplanes? Is that not possible?

(Testimony of Ted Spirz.)

A. No, it is not possible.

Q. You mean it is not possible to provide a place for men to stand where they wouldn't have to stand under the wing of that plane to steady it? [77]

Mr. Kay: He didn't say that. He is talking about putting planking on those beams and putting them in a fore and aft position.

The Witness: You are talking about fore and aft?

Mr. Harrison: I am not a stevedore or a walking boss.

The Court: You indicated——

Q. (By Mr. Harrison): I am suggesting here that is a possibility, I don't know how——

A. I will put the planking in for you and tell you why it won't work, if you want me to. The planking will have to be long enough——

Mr. Resner: You're indicating fore and aft?

The Witness: You want fore and aft?

Q. (By Mr. Harrison): You are the man, you tell me.

A. If we put it both ways, and then you will understand.

Mr. Resner: Put the planks across here, fore and aft.

The Witness: Fore and aft, and the plane is down, and we have the planking in here, all through in here——

Q. (By Mr. Harrison): I am not suggesting that necessity, I am suggesting the planking at a

(Testimony of Ted Spirz.)

place where a man could conveniently reach the wings of the airplane, or the nose, to steady it.

A. Well, you have to have planking over here for this. We will put a wing here (indicating).

Q. Talking about steadying, I am not putting the platform [78] underneath, I am talking about Mr. Leuhr was steadying the plane as it came down. Is it your testimony that Mr. Leuhr was there steadying the plane?

A. He was there steadying the plane, and he is there to land the plane.

Q. At this particular moment when the plane dropped he was steadying the plane?

A. That is correct, he was standing on a ten-inch beam and he had his hands on the tripod steadying the plane.

Q. On the tripod of the plane?

A. The landing gear, the stand, the tripod.

Q. He was entirely under the wing of the plane?

A. Partially under that tripod, that landing gear is underneath the wing so far. That is why you are under the plane to steady that plane, you have to get in there. When you get in there and grab hold of your landing gear, the wing's above you, over you, you're underneath.

Mr. Resner: When the witness said so far he indicated with his hands a distance of one and a half feet.

Q. (By Mr. Harrison): Is it not possible to steady the plane by putting the hands on the wing?

A. The wing is too high.

(Testimony of Ted Spirz.)

Q. Is it not possible to lower the plane down lower?

A. Then you have your tripod and stand in between here, liable to damage your landing gear (indicating). [79]

Q. How long are the tripods?

A. Oh, approximately, the tripod, from the lower part of the wing to the stand I'd say five feet.

Q. You mean the landing gear is five feet, extends below the beam?

A. I wouldn't swear to it, it is a guess, and the bottom under the wing comes to the bottom part of the wing and hangs down.

Q. How far does it suspend, the landing gear platform, above this platform before you make the final landing? A. Before the final landing?

Q. Yes.

A. I would say anywheres within three inches to six, or maybe eight, at the most.

Q. And you say that the landing gear is approximately five feet in length?

A. Approximately, I would say that.

Q. And you say that the man standing there could not reach the wing that is only five feet above, the landing gear five feet?

A. Yes, he could reach it, but he couldn't steady it. There is nothing to hold, the plane, I mean.

Q. Something five feet above the man—Mr. Leuhr's height, I assume, is around five feet, four.

Mr. Resner: No. [80]

Mr. Harrison: Five feet, ten, excuse me.

(Testimony of Ted Spirz.)

Q. That would be about shoulder height?

A. The leading—trailing edge of the wing?

Q. Yes.

A. It is a little higher than that, and no place to grab. You can't—you can shove it, and there is a sharp point in the trailing edge, but you can't hold. If the plane wants to go that way, the wing won't do you any good, won't hold the plane. The taglines are of no use when it gets down that far.

Q. Why not?

A. Because the tag lines are gone when you get, reach the object, and you see that tag line, you see that man over there, see what he is doing, you can see that man over there, and they are working with the plane. The wing is swinging, the three men—you see what is happening, but when the plane comes down there is no vision here, he can't see that man, he can see his feet, but you can't see what he is doing with the hands. That is why you discard your tag lines when the plane comes within reach and you can grab that stand on the landing gear. Then your tag line is of no more use to you.

The Court: The landing gear, you mentioned that a number of times. The landing gear, you say, is about five feet. What does that consist of?

The Witness: That is where your wheel goes, your Honor. [81] It is sticking down.

The Court: Yes.

The Witness: And your tripod is your stand where you land it on your platform.

(Testimony of Ted Spirz.)

Mr. Resner: The wheels are off, Judge; they have tripods.

Mr. Kay: There is a picture that shows it. It is in evidence, and I think, if your Honor wants to look at that——

The Witness: Getting back to——

The Court: I just wanted to follow the testimony.

Q. (By Mr. Harrison): You testified you were standing with your hand on the nose of the plane?

A. That is right.

Q. Yet you say that it is necessary to reach under there and grab the landing gear, he can't properly handle the plane from the height of the wing. How did you reach the nose?

A. I was on the catwalk.

Q. The catwalk appears to be the same height as the mechano deck.

A. Correct, and a part of the nose is just like an oval, doesn't do any good, you can push this way, you can't pull, you can't grab. I was standing there and I had my hands on the nose.

Q. How high were your hands?

A. Why, I'd say up in here. (Indicating) [82]

Mr. Resner: Just above your head?

The Witness: Just above my head, around five and a half, six feet, seven feet. The reason I had my hand on the nose of the plane, if the plane is moving, then I know somebody is not holding onto the plane. That is what I always do, if I am not under the plane on the tripod, got my hand on that,

(Testimony of Ted Spirz.)

I know whether or not the plane is moving, and if it moves, it is going to hit something.

Now, if you want to know about the planks, you have to move these beams at the last instance.

Q. (By Mr. Harrison): How much do you have to move them?

A. It depends on my guess before the plane comes in. I always——

The Court: Depends on your guess, did you say?

The Witness: Yes. If I guess pretty close we don't have to move these beams maybe only six inches or eight inches. If I guess wrong, we might have to move them three feet. That means I have to move these exactly right, get it exactly enough apart of the platform, can't get them too close so this will be wobbly, I can't get it out too far, they have to drill a hole on the outside, and a hole here.

If we have planking on top, or planking fore and aft, then that whole operation will have to stop, because I have to move that one, and I have to move these over here. Now, this one here that has planking on it, it stops me from moving [83] this movable beam. The planking is heavy two-inch plank, have to have anything from two inches or over, if you want safety. But the plank is in the way. All these planks would have to be taken away, and we couldn't lift up the planks with the plane there and jeopardize the men trying to get the planks out, because you are underneath and it is just not practicable to use planking. [84]

Q. You would only have to move the beams six inches, why not move the planks six inches, too?

(Testimony of Ted Spirz.)

A. If I have to move this beam six inches and I have planks here, the men can't move that beam at all.

Q. Move the plank, could they not?

A. Have to get the plank off.

Q. Why can't you move it, slide it easier than a beam?

A. Yes, we move the plank, but you still have to move the beam, but I am not interested in that, I am interested in moving the beam. I have to get the plank off the beam to move the beam.

Q. You have planks on the athwartship beams, you wouldn't have to move them any further than you would have to move the beam itself to get it out of the way?

A. I will take this ruler here, I put a plank in here, fore and aft. That is going to stop me from moving this fore and aft beam. I have to pick it up.

Q. Why can't you slide it?

A. Slide what?

Q. Slide the plank the same as the beam?

A. Where would you slide it to?

Q. Well, now, there is certainly enough space between the beams to move the planks back and forth. A. I can move the plank.

Q. All right, that is all I am asking you. You could move [85] it out of the way.

A. But I still have to move the beam.

Q. Admittedly, but it would be possible to put a plank in there——

(Testimony of Ted Spirz.)

Mr. Kay: Just a moment. Now, planks, that is a confusing thing, and I tried to get away from that, how many planks—you were trying to explain if you have one plank obviously somewhere out in the middle or at the end you can move it.

The Witness: Yes.

Mr. Kay: How many planks do you mean, counsel?

Mr. Harrison: Planks, enough to provide the men a safe place to work.

Mr. Kay: All right, how many is that?

Q. (By Mr. Harrison): Mr. Spirz——

Mr. Kay: Well——

The Witness: Well, I say it is not—it is impossible to use planking on a mechano deck. You can't load an airplane or airplanes with planks on top of your movable beams.

Q. (By Mr. Harrison): You're testifying that it is impossible, Mr. Spirz? A. Correct.

Q. Thank you; I want to be sure that we remember that you said it was impossible, Mr. Spirz.

A. That is correct.

Q. You want to take the stand again? [86]

(Whereupon the witness resumes the stand.)

The Court: Are you going to get through with this witness by 4 o'clock?

Mr. Harrison: Well, I have——

The Court: I will give you plenty of time to think over the problem, as we have an expert here,

so you can make the most of it. I will give you an adjournment.

(Whereupon an adjournment was taken to the hour of 10 o'clock a.m., Tuesday, March 18, 1952.) [87]

Tuesday, March 18th, 1952, 10 o'Clock A.M.

The Clerk: Frank Leuhr vs. U.S.A., further trial.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

Mr. Harrison: Your Honor, please, we were going to continue the cross-examination of Mr. Ted Spirz.

TED SPIRZ

recalled as a witness for the libelant, and having been previously duly sworn, testified further as follows:

The Clerk: Ted Spirz to the stand, heretofore sworn.

Cross-Examination

(Continued)

By Mr. Harrison:

Q. Mr. Spirz, I hope we can get ahead a little quicker today. I have a very few questions I want to take up with you. As a walking boss, you are familiar with the Pacific Coast Marine Safety Code, are you not? A. Yes.

Q. Are you familiar—let me ask you this first:

(Testimony of Ted Spirz.)

At the time that the accident to Mr. Leuhr occurred what was the intended travel of that load?

A. I don't follow you.

Q. Let me put it this way: At the time, the next motion that was to be made with that load was lowering it, was it [88] not?

A. When that plane stopped and Mr. Leuhr had hold of it, and I was at the nose, with my hand on the nose, and Mr. Rosenstock was there by the nose, and Charley, the whistleman—Mr. Rosenstock and I decided to swing it over a little more, so we told Charley to swing it over a little more and he gave the signal.

Q. I see.

A. When the whistleman blew his whistle, and then when he got through blowing his whistle—and he blew it more than once, three or four: I thought there were four—he stopped, and when he stopped the plane dropped.

Q. Do you remember which way the plane moved at the time Mr.—Charley—I guess that is Mr. Cates, is it not? A. Yes.

Q. Do you remember which way the plane moved on his signal?

A. It didn't move. It didn't move sideways. It dropped.

Q. Which direction did you intend it to go? Which direction did you and Mr. Rosenstock want it to go? A. Aft and inshore.

Q. Was that——

(Testimony of Ted Spirz.)

A. (Interposing): I mean aft and offshore. That would be aft and towards the midships.

Q. Was that toward Mr. Leuhr or away from Mr. Leuhr? [89]

A. That would be, where Mr. Leuhr was standing, it would be going away from him.

Q. Away from Mr. Leuhr? A. Yes.

Q. Is it true, Mr. Spirz, that the Pacific Coast Marine Safety Code has some specific provision which requires men shall not stand underneath a suspended load?

A. There is a rule in that book that states that. And if you have—we will take an example, a load of canned goods or a sling load of sacked sugar or coffee, that load is only probably four feet wide at the most and five feet long, and the smallest hatch on a ship—the square of the hatch, like a Liberty No. 3 hatch is twenty feet—a square of twenty feet. A man can stand in the square of that hatch and not be under the load.

An airplane with a wing spread of 35 or 40 feet, and with the landing gear underneath the wings and the tripod stand underneath the wings—three landing gears under the wing, the wing is above—that is not a proper place to hold onto an airplane. The most logical place for any stevedore to hold onto an airplane is that landing gear, that tripod, and that is the lowest part of the airplane.

To land that airplane, you can't go by that. You have to hold onto that plane, that tripod has to be held to land on that platform. You can't stand out

(Testimony of Ted Spirz.)

and hold the wing and [90] leave that tripod loose, because on that jet plane that tripod is flexible. It wiggles. The only thing that is a holding place is, on the other side there is a piece of wire and it has a movement and it isn't a tight bearing.

Q. Why is that a good place to steady the plane, Mr. Spirz?

A. Because I have hold of the thing, the tripod, you can put your hand against it, push it this way.

Q. But if it is movable, it wouldn't steady the airplane?

A. Yes. It is flexible. It will move. At the point of landing we have difficulty keeping that tripod steady. That is why we have to have a man under there. He is astraddle the beam, and he has to be underneath that plane, and there are three places it has to be held and there are at least three, four, five men under the plane, at the exact moment of landing.

Q. All right.

A. We can't get away from being under that plane. It is that low. A man holding to a sling load of canned goods or coffee, it isn't necessary. You don't have to.

Q. There is no such exception to the rule in the book, is there, Mr. Spirz? It doesn't say a man shall not stand under a sling load unless necessary, does it?

A. It says a man shall not stand under a load.

Q. Period. [91] A. Period.

Q. And it says, "shall," does it not?

(Testimony of Ted Spirz.)

Mr. Resner: If the Court please, I think the best evidence is the Code itself.

Mr. Harrison: Mr. Spirz says he is quite familiar with it. A. I am, sir.

Mr. Resner: If I may be heard, the best evidence is the Code itself.

Mr. Harrison: I would like to question him on his understanding of the Code.

Mr. Resner: If I might be heard, Judge—may I?

The Court: Yes.

Mr. Resner: The Code is the best evidence of what it contains, your Honor. The Code was a part and is a part of the union contract between the union and the employers. It contains the standards of conduct that the parties have agreed amongst themselves shall guide safe practices in the industry. This situation, as the witness explained, is one which is a particular and peculiar situation, which is not provided for in the Code. This was the only way this job could be done, and what the Code provides about the thing has no relationship to the job, and cannot. If Mr. Harrison wants to put in the Code, we have no objection, then he can argue it to his heart's content to your Honor. [92]

Mr. Harrison: I will introduce the Code in due time. Mr. Resner's interpretation of whether or not the Code applies to this particular action is appreciated, but——

The Court: What is before the Court now?

Mr. Harrison: Only the fact that Mr. Spirz says

(Testimony of Ted Spirz.)

he is familiar with the Code and I am questioning him as to his understanding of the Code.

The Court: The Code will have to speak for itself regardless of what his interpretation may be.

Mr. Harrison: I intend to and will now offer the Code in evidence, your Honor.

The Court: It may be admitted and marked.

Mr. Harrison: May we introduce this as respondent United States of America's Exhibit A?

(Code referred to was admitted into evidence as Respondent United States Exhibit A.)

Q. (By Mr. Harrison): Mr. Spirz, to change the subject for a moment, how wide is a strongback, generally speaking?

A. Well, you have different sizes of strongbacks. You have different types of ships. I would say the king strongback, you have the—those full hatches, you have probably two inches on each side. A blind strongback, you have a surface of approximately six inches. And there are some strongbacks approximately eight inches wide. There is different types of ships and there is different types of [93] strongbacks.

Q. But they vary between six and eight inches? Sometimes they are even wider than that, are they not, will go as much as fourteen to fifteen inches?

A. With a strongback, fourteen or fifteen inches?

Q. I could be wrong.

A. I haven't seen any.

Q. But they vary between six and eight inches?

(Testimony of Ted Spirz.)

A. They vary, the average strongback, they do.

Q. But they are fairly much the same size as the beams to which we are referring, is that not true? A. Well, it depends on——

Q. Same width? A. Depends on——

Q. This seems to be a very simple question, Mr. Spirz. Are they or are they not comparable in width to the beams?

A. They are comparable in width, yes.

Q. Is it not true the Pacific Marine Safety Code expressly provides men shall not walk or climb on strongbacks in place? A. That is correct.

Q. Do you believe it is any safer to walk on one of these beams than it is on a strongback?

Mr. Kay: I object to that as incompetent, irrelevant and immaterial.

Mr. Harrison: Withdraw the question, your Honor. [94]

Q. (By Mr. Harrison): As a walking boss, you are paid by the hour or day?

A. I was employed by Jones Stevedore Company on a monthly salary up to approximately two years ago, and then I went on the plug board.

The Court: On the what?

A. We have a union—walking boss union and what we call a plug board. In other words, I am free lancing. I will work for the Jones Stevedore Company, I will work for the West Coast. I work for them all now.

Q. (By Mr. Harrison): But at the time of the

(Testimony of Ted Spirz.)

accident you were free lancing, were you, or were you employed by Jones?

A. Well, the accident was twenty months ago, approximately?

Q. Yes.

A. Then I was on the plug board. But I preferably and mostly worked for Jones even today.

Q. As I understand it, employees who are not steady employees of a specific stevedore company are entitled to go to some company even though they are on the plug board, if they so desire? If you have a choice, you work for Jones?

A. Correct.

The Court: What about the board? Distribution of work?

A. The plug board is, when I am working on a job and I know I will be through today, and say it is the Jones Stevedore [95] Company, they don't have any work tomorrow, I will call up the secretary and say I am available. There may be another company wants a man, and he will tell them who is available, say Spirz and Joe Doakes, and he will say, "I want Joe Doakes," and, "I want this one," and that is how we are employed.

Q. (By Mr. Harrison): The stevedore company —Jones in this instance—gets paid by the number of tons loaded, do they not?

A. Jones? I have worked for them eight years now, six years steady. They don't tell me what they make. They don't tell me how much. They might tell me it is a tonnage basis, but they won't

(Testimony of Ted Spirz.)

tell me what they are getting. If it is cost plus they might tell me if I ask, but they never——

Q. Did you know what basis Jones was being paid on?

Mr. Kay: Just a moment. The contract speaks for itself. This was done pursuant to contract. It is on there. We have even pleaded it. This man doesn't know anything about it. He has said so.

Mr. Harrison: He said sometimes he would, sometimes he didn't.

A. I knew if it was a contract job, probably, but I didn't know what they made.

Q. (By Mr. Harrison): Did you know whether it was tonnage or cost plus? [96]

A. I knew the airplanes is a tonnage job.

Q. In other words, the more tons they loaded a day, the more money Jones would make?

Mr. Resner: That hasn't a thing to do with this case.

Mr. Harrison: I am sure I can tie this up, your Honor.

The Court: What is that?

Mr. Harrison: I am sure I can tie this up. I intend to show that if they took the time and went to the inconvenience of providing what we consider necessary safety equipment, it would have delayed the work, would have taken a longer time to perform this work. On a tonnage basis Jones Stevedore Company would have suffered by the fact that fewer tons were loaded per working day. If the witness knew it was a tonnage basis, I intend

(Testimony of Ted Spirz.)

to ask him whether or not providing safety equipment as such would have delayed the work.

Mr. Kay: We will object further on the ground that if that were the case, the witness should be asked if it took three times as long, or whatever it took, to do the job, if they might contend they should have required a higher tonnage payment.

The Court: I am afraid we are going afield. For example, whether you load ten tons in twenty hours, how [97] would that enter into the merits of this case?

Mr. Harrison: I would like to show, your Honor, the reason that they failed to take safety precautions was that they were attempting to load as many possible tons per day in order to make more money —ordinary incentive.

The Court: They all do that, whether it be sugar or cans or whatnot. Everybody is out to get the money. But our problem here is the question of, an accident occurred. In spite of the rule, necessity has men going under these planes. To me that has no answer. I say that kindly.

Mr. Harrison: We intend to show, your Honor, by subsequent witnesses this job could have been done in a far safer manner and it wasn't.

The Court: Go on. Proceed.

Mr. Harrison: I believe that is all I have, Mr. Spirz.

(Testimony of Ted Spirz.)

Cross-Examination

By Mr. Kay:

Q. Mr. Spirz, on this job, you testified Mr. Rosenstock was aboard the vessel, the Shawnee Trail? A. That is correct.

Q. And Mr. Rosenstock, he is the representative for the army, is that correct, the air force?

A. That is correct.

Q. Was there any other government representative there?

A. Well, at that time of the accident I don't think so, but there is always an officer from Camp Knight, an army [98] officer, that is around or aboard ship.

Q. On this particular job? He was there at that particular instant, that is, the instant of the accident, there was another army representative there, too, superintendent, wasn't that correct?

A. Well, always around.

Q. That is what I mean.

A. It is his duty. The army requires an officer to go to different ships that are being handled, working army cargo.

Q. And he generally——

Mr. Harrison: Excuse me. May we have the answer clarified? You asked him whether or not an officer was there at this particular time. I don't believe he answered.

Mr. Kay: I think he answered.

Mr. Harrison: He did not answer yes or no.

(Testimony of Ted Spirz.)

The Court: Was there or was there not an officer there at that time, at that particular time, if you know?

A. No, he wasn't.

Q. (By Mr. Kay): But Mr. Rosenstock, however, was? A. Yes.

The Court: Pardon me, what was the duty of the Government representative, Rosenstock?

A. The duties of an officer——

The Court: Of Rosenstock?

A. He is in charge of the airplane, the safety of it, and [99] he is—the lashing; anything that we do, if he says he doesn't want it that way, we don't do it that way. If he wants it this way, we do it that way. He is, in fact, he is in charge of me. He is my superior when we are on the job.

Q. (By Mr. Kay): If there is anything about the way in which you are doing this work which is not satisfactory to the army man, Mr. Rosenstock, would he have the right to direct you to do it otherwise? A. Yes, sir.

Mr. Harrison: I object, your Honor. This witness doesn't know what the duties of an army officer are, a civil service employee.

The Court: Well, he may answer. He may tell us what was done down there, what the officer did.

Mr. Harrison: That is true, but he asked whether or not Mr. Rosenstock had a right to tell him. Whether or not he told him is one thing; whether or not he had a right to, I suggest this witness is incompetent to say.

(Testimony of Ted Spirz.)

Mr. Kay: Let me clarify this, and we will go into it another way which I think will be satisfactory to Mr. Harrison.

Q. (By Mr. Kay): How many of these ships did you say you had worked on with mechano decks loading planes? I think you mentioned about twenty-four?

A. Approximately about that. [100]

Q. Covering a period of what time?

A. Since the Jones Stevedore Company received the contract at the Alameda Air Base, and we got the contract—Jones Stevedore Company got the contract to load airplanes on ships.

Q. Is that a period of about a year, or just what?

A. Well, up to the time of the acicdent?

Q. Yes.

A. Well, from approximately 1945, early part of 1945, up until the accident. We were loading mostly during the war——

Q. (Interposing): That is several years, is it not? A. Yes, it is.

Q. When was the first time you saw Rosenstock on any of these jobs? Had he been on other jobs than the one where the accident happened?

A. We loaded a lot of planes below decks—we have loaded many airplanes below decks, and the first time I saw Mr. Rosenstock I think he didn't have that job. But he was—he came over and watched the work.

(Testimony of Ted Spirz.)

Q. I am trying to find out when you first had occasion to work under Mr. Rosenstock?

A. When——

Q. Was it more than this one occasion?

A. Oh, yes. [101]

Q. That is what I am trying to find out. Was it several times?

Mr. Harrison: I object to the phrasing of the question. The way Mr. Kay put the question is, "Are you working under Mr. Rosenstock?" My point is—may I examine on voir dire?

Mr. Kay: I don't think he is entitled to.

The Court: It may clear the situation.

Voir Dire Examination

By Mr. Harrison:

Q. Was Mr. Rosenstock your employer?

A. No.

Q. Did Mr. Rosenstock at the time of this particular accident give orders to any of your men?

A. No, sir.

Q. Did Mr. Rosenstock at the time of this accident give orders to you? A. Yes, sir.

Q. Concerning what?

A. The work. Concerning everything that pertained——

Q. Did he demand——

Mr. Kay: Just a moment, let him finish his answer.

The Court: Finish your answer.

(Testimony of Ted Spirz.)

A. Mr. Rosenstock gave me orders of where he wanted the airplanes.

Q. (By Mr. Harrison): Where he wanted the airplanes? Did he give you any orders concerning the method in which to [102] load the airplanes?

A. Yes, sir.

Q. what?

A. For instance, the planking. He designed the planking, the platform. Maybe I didn't like the platform. Maybe I thought we got a little lighter one would do, but that was his platform and we used his platform.

Q. Did you make such suggestion that he use a lighter planking?

A. I made a lot of little suggestions and if he agreed, we would; if he didn't, we wouldn't.

Q. Did he give any orders from the time you took over the loading of the planes, that is, took over the direction of your men, as to steadying the placing of the airplane? Did he give you any orders, say, "Don't have that man stand there," or, "Don't do this or do that"? Did he give you any orders in that respect?

A. No, not that I remember.

Mr. Harrison: Thank you.

Cross-Examination
(Continued)

By Mr. Kay:

Q. Was Rosenstock, then, the man you would always look to to see whatever work was done was

(Testimony of Ted Spirz.)

done satisfactorily insofar as the army was concerned?

A. Mr. Rosenstock and I worked hand in hand, and he had—he drew the plan and everything he wanted done that was safe, [103] and it was always safe, I had to do, and I would gladfully do because we worked together and it made my work easier.

Q. If you thought work should be done a certain way and he wanted it another way, how was that handled?

A. He was in charge because my superintendent told me to take orders from Mr. Rosenstock.

Q. All right. Now, on this occasion or any other occasion that Mr. Rosenstock was present during the loading of planes on mechano decks, did he ever suggest to you or direct you to put planking on the mechano deck?

Mr. Harrison: I object. This particular occasion is the only thing we are concerned with.

Mr. Kay: Oh, no.

Mr. Harrison: Previous times are not in issue.

Mr. Kay: I will do it this way:

Q. (By Mr. Kay): On this occasion that the work was being done when Mr. Luehr was injured did Mr. Rosenstock ever make any suggestion or give you direction to put any planking on the mechano deck? A. No, sir.

Q. On any other occasion that you worked with mechano decks, that is, putting planking on mechano decks, in which Mr. Rosenstock was present, did he

(Testimony of Ted Spirz.)

ever suggest or direct you to put planking on the mechano deck? A. No, sir. [104]

Q. Now, so far as you were concerned, in your experience as a walking boss or as a longshoreman, did you ever hear a longshoreman object to working on the mechano deck on a vessel such as the Shawnee Trail on the ground that it was unsafe?

A. No, sir.

Q. And did you ever hear of anyone in the longshore industry that ever objected or suggested that this was an unsafe structure? A. No, sir.

Q. Now, I imagine that in the course of your career as a walking boss, when you were handling these mechano decks, a loading job, you must have loaded hundreds of these planes, is that correct?

A. On a mechano deck?

Q. Yes.

A. I would say hundreds. Below decks, thousands. Up to a thousand of them.

Q. In connection with the mechano deck, that is the situation we have in the Shawnee Trail, was there ever an occasion when any man fell off of that deck? A. No one.

Q. Did you ever hear of any such incident?

A. No, sir.

The Court: Approximately how many planes can you put on a [105] deck of that kind?

A. Aft and forward, approximately 15 of those big—depends on the type of plane. The smaller plane, you would get more, and the larger plane like this jet, which is quite huge, you get less.

(Testimony of Ted Spirz.)

Q. (By Mr. Kay): Now, at the time that this plane suddenly dropped on Mr. Luehr, was there any sign or signal or anything you could observe that gave any warning that the plane was about to drop? A. None whatsoever.

Q. Now, Mr. Luehr was standing on one of these cross beams, that is a solid ten-inch thick beam, isn't that right? A. That is right.

Q. When you testified earlier you mentioned that you were over on the catwalk. After he fell you came down the stairs to a point, arriving just forward of the midship house. You didn't take an exact note of just where that was at that time, did you? A. I wouldn't be exact, no.

Q. And it would probably be up in the area of the No. 2 or above, or forward of the No. 2 beam, counting from the midship house forward, is that right? Up in here (indicating on model)?

A. It could be two or three beam.

Q. And that beam is a solid, affixed beam, is that correct? [106]

A. That is correct. That is solid.

Q. Now, referring to this afterthought of the Government with respect to the alleged use of planking, if there had been planking along here where Mr. Luehr had to stand to do this job at the time this plane fell, and he had been standing there holding onto the plane, as you testified he was required to do, and that plane fell suddenly, as it did on this occasion, would the fact that there was that planking there have prevented Mr. Luehr's injury?

(Testimony of Ted Spirz.)

Mr. Harrison: I object, your Honor. Requires a supposition of the witness. [107]

Mr. Kay: Supposition based on his—their whole case.

The Court: Overruled. You may answer.

The Witness: Answer the question?

The Court: Yes, read the question.

(Question read by the Reporter.)

A. Well, it is a blessing he didn't have any planking under him, because he was under that plane holding on, that plane hit him solidly on the shoulder and drove him down, and if there was planking under him he would have been crushed, he absolutely would have been crushed and on top of that planking the plane bounced, he would have been hit again if there was planking under him.

Q. (By Mr. Kay): All right. When Mr. Luehr was struck by this plane you say it was a direct crushing blow, it wasn't a glancing blow?

A. It drove him down, it hit him straight on the shoulder and drove him straight down.

Q. And after it hit him was he momentarily caught up there, his legs?

A. I didn't see his legs.

Q. But could you see the other part of his body?

A. I could see the other part of his body, yes.

Q. And what position was that in?

A. Well, being no planking there he was below the fore and aft beam, see? [108]

Q. So that he was hanging toward the deck?

(Testimony of Ted Spirz.)

A. He was hanging toward the deck, yes.

Q. And you are indicating with your hands extended down toward the deck, is that correct?

A. Correct.

Q. And after the plane bounced, then did he slide down to the deck in that position?

A. He fell.

Q. From that position?

A. From that position he fell to the deck, and I might add he fell nicely.

Q. Yes.

A. That's why—I just know that if there was planking there he would have been crushed.

Q. Yes. Now, one other question, Mr. Spirz. On this model that you see here you find the deck below the mechano deck is free of any piping and so on. Will you state whether or not on the Shawnee Trail in this particular area where Mr. Luehr was hurt, what was the condition with respect to whether there was piping or obstructions or anything of that sort?

A. Well, where Mr. Luehr was hurt, where Mr. Luehr fell it was fortunate there was a clear space. But other areas where it is just piping, ventilators. Where Mr. Luehr fell he fell in a clear space, he fell towards the rail where there [109] is a passageway to walk.

Q. But in this entire area, I am referring to this whole section that you see in the model, will you state to the Court, and I think we have some pictures here that will show it, but not too clearly,

(Testimony of Ted Spirz.)

where there is a maze of pipes, ventilators that have openings that hinge up, and structures of that sort that would prevent putting a Save-all or something of that sort in there?

A. Oh, yes, there is a maze of pipe along the main deck, there is valves, there is vents that they open up, it is a hatch type affair, just a maze of pipes and vents all through the whole main deck; by the mast is a winch.

Q. And in view of that situation will you state whether or not it is feasible to put a Save-all or net underneath there?

A. No, it isn't—not feasible.

Q. And if a Save-all or net had been under this area where Mr. Luehr fell, would that have prevented his injuries?

Mr. Harrison: I object to that, definitely calls——

Mr. Kay: All right, I will withdraw that. That is all.

Recross-Examination

By Mr. Harrison:

Q. May I ask a few more questions? There were other men under this airplane when it fell, were there not, Mr. Spirz?

A. I don't know if there were other men under the airplane. [110]

Q. Other men working around it, were there not? A. Yes.

Q. How come they were able to escape when the plane fell?

(Testimony of Ted Spirz.)

Mr. Kay: I object to that as incompetent, irrelevant and immaterial, no proper foundation, your Honor.

Mr. Harrison: He is supposed—he is supposing what would have happened to Mr. Luehr.

The Court: Foundation hasn't been laid.

Q. (By Mr. Harrison): Where were they?

A. Well, I can explain why I don't know where the other men were. The nose, I was by the nose on the forward side of the nose on the catwalk.

Q. Yes.

A. I could see Mr. Luehr, but I couldn't see aft. I couldn't see, there was a wing and the nose, and I was talking about the ship, moving it, and I didn't notice, but when the plane dropped I was—happened to be in a position where the only one I could—I saw when I looked, I knew he was there, was Mr. Luehr.

Q. Yes. Then you don't know whether there were any other stevedores underneath the plane or not?

A. I couldn't swear to it.

Q. However, no other stevedores were injured at this time; correct? A. Correct. [111]

Q. Can one man perform the job of steadying the plane and putting it into position?

A. Of putting it into position?

Q. Can one man perform the job of steadying the plane?

A. You want to know if one man can steady the plane?

(Testimony of Ted Spirz.)

Q. Yes. In other words, could Mr. Luehr by himself have performed the job which you were asking to be done?

A. Well, I want to clear myself. To steady the plane?

Q. Do the job which you wanted done, could Mr. Luehr have done it by himself?

A. Going to land a plane, Mr. Luehr could never do it by himself.

Q. Then it is safe to suppose that there were other men in similar positions to Mr. Luehr in order that this job could be done?

Mr. Kay: Just a moment, I object to that as conjecture, your Honor. Already testified he doesn't know, and I don't think any witness can suppose what——

Mr. Harrison: You just had him suppose what would have happened——

Mr. Kay: No, that was based upon your supposition; this is an entirely different thing, your Honor. He has already testified he couldn't see where the other men were.

The Court: In any event, he didn't see anyone else there, may have been there, but he didn't see them. [112]

Q. (By Mr. Harrison): You don't know—you know there were other men working when the plane fell? A. We have a gang of men working.

Q. They were working around the plane, were they not?

(Testimony of Ted Spirz.)

A. They were all around there on the catwalk; Mr. Luehr I saw.

Q. Were there any other men on the mechano deck?

A. The only one I saw on the mechano deck at the time of the accident was Mr. Luehr.

Q. What part of the plane hit Mr. Luehr?

A. The wing, the trailing edge of the wing, I saw it hit Mr. Luehr on his left shoulder.

Q. You saw how it threw him, squashed him directly down? A. It buckled him up.

Q. I see. I call your attention, return now to the duties of Mr. Rosenstock. I call your attention to your testimony yesterday. Fortunately it has been transcribed and I have it here before me, the Reporter's daily transcript. On page 28, line 7, this question was asked of you, Mr. Spirz.

Mr. Resner: Line 7?

Mr. Harrison: Line 7, page 28.

Q. This question was asked of you:

"Question: All right. What does Mr. Rosenstock have to do with that particular operation at that point? [113]

"Answer: He has nothing to do but just observe."

A. What point are you talking about?

Mr. Kay: Pardon me just a moment. Your Honor, I think it is very unfair, the rest of the questions and answers ought to be read in connection with that particular subject, and I think it will show it is pretty well clarified.

(Testimony of Ted Spirz.)

Mr. Harrison: I was looking for it, your Honor; I didn't place it on this short notice; I didn't realize the witness was going to change his testimony over night.

Mr. Resner: I think that is an unwarranted statement, if your Honor please.

The Court: Well, I will allow it for the heat of the battle.

Mr. Resner: All right, Judge.

Mr. Harrison: If you would like to find the portion you would like to have read, Mr. Kay.

Mr. Kay: Yes, I will read it. That is line 7.

"Question: All right. What does Mr. Rosenstock have to do with that particular operation at that point?

"Answer: He has nothing to do but just observe.

"Question: I see. Well now, does he tell you where to spot the planes?

"Answer: Yes, he has a plan and we get it prepared, we get it ready before the plane comes in. [114]

"Question: Is that plan one developed by the Army?

"Answer: Well, I think Mr. Rosenstock developed the plans.

"Question: He is with the Army?

"Answer: He is with the Army Air Corps, yes, sir."

Mr. Harrison: May I add to that, your Honor, page 25, line 20.

(Testimony of Ted Spirz.)

"Question: Who is Mr. Rosenstock?

"Answer: Why, he is in charge of the airplanes for the Army Air Corps, so far as I know. I don't really know his title, but he is in charge of all the airplanes, responsible."

I believe that is the only other reference.

Mr. Resner: If your Honor please, on page 29 at lines 10 to 14:

"Question: Then that would be parallel to the catwalk?

"Answer: Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock's plan he gives an idea just where those wheels will be."

Your Honor asked: "Those are adjustable? Are they [115] adjustable, or when are they put on there?

"The Witness: I don't understand.

"Q. (By Mr. Resner): The Court says when are they put on?

"The Court: When you are lowering the plane?

"The Witness: The stand on the—no, these platforms are put on these movable beams.

"The Court: Yes."

Mr. Harrison: I believe those are all the references to Mr. Rosenstock.

Q. Mr. Spirz, you were called here as a witness by Mr. Resner, were you not?

A. I was subpoenaed, yes.

Q. Subpoenaed by Mr. Resner. Have you dis-

(Testimony of Ted Spirz.)

cussed your testimony with Mr. Resner?

A. Yes.

Q. Have you discussed it with Mr. Black and Mr. Kay? A. Yes.

Mr. Harrison: I believe that is all.

Further Recross-Examination

By Mr. Kay:

Q. Mr. Spirz, before you ever discussed this with me or Mr. Black or Mr. Resner, the Government came over to you and got a complete statement about the accident, isn't that correct, or representatives of the Government?

A. That is correct. [116]

Mr. Kay: That is all.

Redirect Examination

By Mr. Resner:

Q. In other words, Mr. Spirz, anybody in any official capacity in connection with this case who asked you what you know about it, have you told them? A. That is correct.

Q. And what you told them, is that the same thing you have told the Court here during the course of your testimony yesterday and today?

A. That is correct, whatever they asked me I told them.

Mr. Resner: That is all.

The Court: Step down.

I beg your pardon; just a moment.

(Testimony of Ted Spirz.)

Mr. Resner: Oh, Mr. Cooper.

The Court: Almost forgot you were here.

Mr. Cooper: As counsel has indicated, I am really not very much concerned about the case. I mean, as counsel indicated by their actions they figure I am here just to watch the case being tried, but at any rate there are a few points which I think could be advantageously clarified, which I am not clear, perhaps familiarity of the others with the case would make this unnecessary.

Cross-Examination

By Mr. Cooper:

Q. But tell us, Mr. Spirz, how many platforms would have been in use at that time for landing this [117] particular plane on?

A. Just for one plane?

Q. Yes. A. Three platforms.

Q. Three platforms? A. Correct.

Q. And the three wheels which were in the form of a triangle were to go on those three platforms?

A. Correct.

Q. And as nearly as possible you positioned these as near as you could guess, I believe you used that expression, you positioned these platforms so that they might not have to be moved?

A. That is correct.

Q. You had to do one of two things, however, in almost every case, including this, did you not; you either had to move the platforms or had to move the plane, is that correct?

(Testimony of Ted Spirz.)

A. Move the platforms, or move the plane?

Q. Yes. A. Well, the way——

Mr. Cooper: Withdraw that.

Q. In this particular case was it, do you recall whether it was necessary to move any of the platforms? A. Will you repeat that question?

Q. I say, in this particular case do you recall whether it [118] was necessary to move any of the platforms in order to put them precisely under each wheel?

A. In every instance that we landed a plane, every single instance, we had to move the movable beams or the platform or both, or all three of them.

Q. I see.

A. I can explain further if you would like me to.

Q. Well, I think that answers the question but if you would prefer to go ahead——

A. I would like to prefer. It is precise, the job. Now, Mr. Rosenstock is efficient, and he is a good man. When he calls up his plane he has the nose right where the railing is, so you have a passageway, and then this platform is at a certain point, and the other platform, and I do my guesswork, and he helps me, "Let's put it there, let's put it here; that's just about it." When we get the plane over the spot the wing is out by the rail, and Mr. Rosenstock wants it over a little more, and we will fudge, we will go over the rail, we will put the nose over the rail.

Q. Talking about the rail of the catwalk?

(Testimony of Ted Spirz.)

A. On the catwalk. Now, when we do that we have to move the platforms, the three of them. When we move the three platforms we have to move the movable beams. We are trying to get that up close amidship to keep it away from the heavy seas.

Q. I understand that. [119]

The Court: You understand that, being of the sea.

Mr. Cooper: That part I do understand.

The Witness (Continuing): That is why in every instance your plane goes kaput, because we are going inboard, and when we land that plane, Mr. Rosenstock, oh, he will get ahold of the Mate and it will be okay with him, and it will be over the railing, because we ask him, because the nose is up about—up here (indicating) and liable to hit one of the sailors, he understands the situation, and we would not have asked him, he never refused it, they said okay.

Q. Am I correct in believing that two of the wheels are exactly opposite on the plane? That is, one is approximately under one wing and one is approximately under the other wing?

A. That's correct.

Q. And then the other wheel is toward the nose or toward the tail? A. Nose.

Q. Toward the nose? A. Nose.

Q. Am I correct in believing that the nose, that the plane was pointing approximately at right angles to the catwalk, that is, lining up the nose and the tail with the—— A. The nose.

(Testimony of Ted Spirz.)

Q. At that particular occasion?

A. Yes, towards—pointing toward the [120] catwalk.

Q. I see, and the wings were extending out parallel to the catwalk?

A. Well, not exactly parallel, because we had the plane a little turned.

Q. I see, a little camber, as you would say?

A. A little camber on the wing.

Q. Then on this particular occasion, I take it from what you have said, it was necessary to have at least three longshoremen out on the mechano deck in order to move any beam that was necessary or any one or more of the three platforms, is that correct?

A. At this moment it wasn't necessary to have three men out there, because we still had to move the plane. We were fortunate in one respect, that we had still to move the plane, because we might have had three or five men there at the time the plane dropped.

Now, because we had to move the plane over the foot or so nobody was getting underneath to move the platform or the movable beams.

Q. Do I gather from what you say it was necessary at that particular stage for anybody to get under there?

A. At that particular point. It was only to hold that plane safe.

Q. In other words, steadying it, not move it.

A. Steady it so it wouldn't move. [121]

Q. Yes. Now, you have told us, I believe, on

(Testimony of Ted Spirz.)

direct examination, that no man ever refused to work on a mechano deck, no longshoreman, within your experience? A. That is correct.

Q. And I take it from what you have said then if any man objected to the conditions, why, then he could go ashore, he didn't have to continue to serve?

A. Well, he would tell the gangboss or preferably me, and then he would go to his business agent, of his local, and the business agent would come out and see me, if that was the case.

Q. He would go ashore and take it up ashore?

A. Yes, he would take it up with the business agent and the business agent would come to see me and ask me what, if it wasn't safe, what can we do about it. But no one ever has done that.

Q. If a man worked on one day on a ship he could stay ashore the next day, didn't have to come back or work the next day, did he?

A. No, sir, he didn't.

Q. A longshoreman working under the conditions where he lived ashore is free to go and come, work on the ship or not, just as he pleases?

A. He can quit when he wants, practically, if he wants work; if he doesn't want work, he doesn't work. [122]

Q. And for any reason at all?

A. For any reason.

The Court: This is a free country.

Mr. Cooper: That is what I wanted to develop, your Honor, it is a free country for a longshoreman.

Mr. Resner: And for Dorr, Cooper & Hayes.

(Testimony of Ted Spirz.)

Mr. Cooper: I hope so.

Q. Now, Mr. Spirz, you don't know for sure, I take it, whether there were any men actually out on the mechano deck other than Mr. Luehr at this time, or not?

A. I stated I didn't see them.

Q. You don't recall having seen them?

A. No, I saw Mr. Luehr way before—out on the deck before the plane was stopped.

Q. Can you tell us whether Mr. Luehr at the time he was attempting to do this job was actually standing on a thwartship beam or whether he was standing on a fore and aft beam, you did see him, his feet, where he was standing?

A. He came right out on the 10-inch beam, that stationary beam. He came right out on there, and that is where he stood, and fortunately that's where the landing gear was and that is where he was, he was standing on that 10-inch beam.

Q. I see. You had seen him come out and take a position on the 10-inch beam, had you?

A. That is correct. [123]

Q. Did he have to move—I will put it this way: did he move in order to take hold of the plane after that?

A. When he went up to the plane he put his hands right on it.

Q. Now you misunderstood my question, I am afraid, I take it from your answer that he had moved, he moved up from where he was standing and put his hands on the plane?

(Testimony of Ted Spirz.)

A. That is correct, he moved from the rail of the inboard side, port side up to the ship after it stopped and grabbed ahold.

Q. About how far did he move, would you say?

A. Well, he was on the outside by the rail, ten, twelve feet, somewheres in there, moved up to the——

Q. That is, he moved toward the port side, is that right?

A. He moved from the port side in to the midship.

Q. Moved from the port side toward the midship?

A. That is correct, he was outside by the rail of the ship on the mechano deck.

Q. Now, the vessel that you have worked on, was the mechano deck substantially the same as the mechano deck on the Shawnee Trail? The other vessels you worked on?

A. Yes, they are approximately the same.

Q. Approximately the same.

Mr. Cooper: I believe there is nothing further.

Mr. Resner: No questions. [124]

Mr. Harrison: No further questions.

The Court: Take a recess.

(Short recess.) [124-A]

Mr. Resner: If your Honor please, at this time the libelant and his counsel are satisfied that the evidence thus far clearly shows, and the evidence we know will be adduced will show that the efficient

and proximate cause of this accident was the negligence of this crane operator in coming in contact with the lever and dropping the plane, and we don't feel that the evidence has or will show that the vessel, so far as her structure was concerned, was unseaworthy, so we are going to make a motion to dismiss against the respondent American Pacific Steamship Company.

Mr. Harrison: We, for the Government, will certainly object to dismissal. It would prejudice our right to bring the American Pacific in as impleaded-respondent, and we would like very much to have American Pacific in here. There are many other reasons which probably will not appear during the course of the trial, which we believe the American Pacific should be here.

Mr. Kay: This may seem out of my field, but I think as a friend of the Court I can say they are not an impleaded-respondent. What happened originally, they had been impleaded by the Government. The Government then dismissed, and then Mr. Resner brought them in as a respondent. They are chargeable only—could only properly be liable to the libelant, and if the libelant chooses to dismiss, we will certainly be glad to see it and we join in that motion. [125]

Mr. Harrison: My argument is that the fact that they were a respondent, I didn't go ahead and implead them after Mr. Resner filed his amended complaint.

Mr. Resner: Your Honor has to understand—and I am sure you do——

The Court (Interposing): There is a lot I can't understand, but I will have no difficulty in this problem. They will stay in here, and I will ask counsel to make himself comfortable.

Mr. Resner: Without prejudice, I assume, your Honor?

The Court: Without prejudice.

Mr. Resner: We enjoy Mr. Cooper's charming personality.

Mr. Cooper: I am very glad I didn't have to say anything, your Honor, and I will try to keep quiet during the rest of it.

The Court: I suggest you relax until danger appears, then you might rouse yourself.

Mr. Resner: May I ask if there is a deposition available for Cecil Bailey and Charles Cates?

The Clerk: I will look for them. I didn't find them yesterday.

Mr. Resner: Then may I borrow that copy? I will read the questions and I will ask my worthy associate, Mr. Magana, to read the answers.

Mr. Harrison: We might suggest for the record that we [126] don't feel there is any necessity for reading the depositions. Of course the libelant is entitled to do so, but we would be agreeable to just submitting the depositions in the record.

The Court: You don't know my practice here. I want it to register now as we go along. It may be of assistance to me in the matter. I will have to read them if you gentlemen don't, so I will give you the burden of reading them.

Mr. Resner: If your Honor please, I might tell

you that on June 29, 1951,—last year—we took the deposition of these two men, Cecil Bailey and Charles Cates. Cecil Bailey was the man who was operating the crane which dropped the plane, and Charles Cates was the whistle man who stood on the catwalk and gave the signal. He is the man, Charley, Mr. Spirz referred to.

These men were both employees of the army at the time of the accident, and the appearances at that time were the same as the appearances in the Court before your Honor insofar as counsel are concerned. The witness was sworn and the examination proceeded. I interrogated the witness, and I will read the questions and ask Mr. Magana to read the answers.

Coming to page 5:

DEPOSITION OF CECIL BAILEY

"Direct Examination

"State your name, please? [127]

"A. Cecil Bailey.

"Q. Your residence?

"A. 535 Cypress Avenue, San Bruno, California.

"Q. How long have you lived there?

"A. About two years.

"Q. How old are you, Mr. Bailey?

"A. I am forty-seven.

"Q. What is your occupation?

"A. Well, I have been a crane driver for quite a few years, and I went to sea part of the time.

(Deposition of Cecil Bailey.)

"Q. How long have you been a crane driver?

"A. Approximately 12 to 15 years.

"Q. 12 to 15 years? A. Yes.

"Q. Are you employed at the present time?

"A. Yes.

"Q. By whom? A. By the army.

"Q. Is that by the United States Army?

"A. Yes.

"Q. And your pay checks come from the United States Treasury, do they? A. Yes.

"Q. That is, they are Treasury checks?

"A. They are checks, yes, Government [128] checks.

"Q. Yes. Where do you pick them up, or how do you get them? A. At Fort Mason."

Mr. Harrison: If your Honor please, at this time it appears that there is no reason for taking this deposition. There is nothing to show that the man whose deposition was being taken was to be out of the district at this time. There is nothing to show he wasn't available at the time of trial, nor did we stipulate to the taking of the deposition.

Mr. Resner: Well——

Mr. Harrison: We suggest that the witness is as available to Mr. Resner as anybody else. If he wishes his testimony, he can subpoena him.

Mr. Resner: Mr. Harrison advised me the witness was in the Panama Canal zone. And so far as the stipulation is concerned, Mr. Ferguson said this:

"Before you proceed let the record show this deposition cannot be taken under the De Bene Esse rule, nor under the 'Notice Given' one, but it is being taken pursuant to an agreement to that effect, and we do not wish to have it taken as a precedent for the taking of depositions."

Mr. Harrison: We agreed to the taking of the deposition. We did not agree that the deposition be admitted into evidence. [129]

Mr. Resner: I don't see how you can agree to taking a deposition and then not that it can go in.

The Court: If the witness is available——

Mr. Resner: Will you stipulate you advised me he was in the Panama Canal zone?

Mr. Harrison: I told you his friends told me he intended to go to the Panama Canal zone. Whether he was there, I don't know.

Mr. Resner: Let's not trifle with what you said to me. On two or three occasions in your office you told me Mr. Bailey was in the Panama Canal zone and would not be available for the trial. Did you or did you not tell me that?

Mr. Harrison: I did not.

Mr. Resner: Well, I represent to the Court I was advised by the United States Attorney the witness was in the Panama Canal zone.

The Court: Is anybody able to advise the Court whether or not he is available now?

Mr. Resner: I will ask Mr. Harrison to advise your Honor. This man is an employee of the United States, under their control, not ours.

Mr. Harrison: He is not an employee of the United States, your Honor. May I have the date at which he terminated his employment? I also have a note which I was referring to at the time I was talking to Mr. Resner, reading: [130]

> "Cecil Bailey, crane operator, resigned from Government service on October 30, 1951, for reasons of poor health. Acquaintances state he was planning to go to Panama or Dunkirk. His last address is 535 Cypress Avenue, San Bruno."

That is a note I made of the telephone conversation.

Mr. Resner: Under the rules——

The Court: Just a moment. When did you last hear from him?

Mr. Resner: The last and only time I ever saw the man was at the taking of this deposition.

The Court: You have no further information?

Mr. Resner: I have none.

The Court: The Government has no other information?

Mr. Harrison: In all fairness, your Honor, I must say a month after this deposition was taken this man came to my office and asked if I thought it would be necessary that he appear in Court. I advised him at that time that my interpretation of the rule was, if he were available he would be called; and he walked out of the office, and that is the last I saw of him. I made a phone call to determine his whereabouts and was advised as this note indicated.

The Court: Under the circumstances, and keeping in mind [131] the commitments of the counsel for the Government on the deposition, I will allow it to be read.

Mr. Resner: I am going to page 6.

(Thereupon the deposition of Cecil Bailey was read to the Court until the hour of 12 o'clock, noon, at which time an adjournment was taken to the hour of two o'clock p.m.) [131-A]

DEPOSITION OF CECIL BAILEY

Direct Examination
(Continued)

By Mr. Resner:

Q. At Fort Mason, San Francisco?

A. That's right.

Q. I direct your attention to July 28, 1950. Who was your employer on that date?

A. The Army.

Q. Who paid you at that time?

A. We got our checks from Fort Mason. Government checks.

Q. In the same way that you get them now, as you have just described to me? A. Yes.

Q. When did you go to work for the Army for the first time?

A. For the first time? I worked for them during the last war.

Q. All right. But let me put it this way: Immediately preceding today, when did you first start working for the government?

(Deposition of Cecil Bailey.)

A. I will be there a year the 17th of next month.

Q. The 17th of July? A. Yes, sir.

Q. So you started working for the government on July 17, 1950?

A. I believe it was—I'm not sure whether it was the 17th or 7th I started.

Q. Either July 7th or July 17th of 1950?

A. Yes, sir. [6*]

Q. And in what capacity did you go to work for the government? A. Crane operator.

Q. Where did you go for your employment?

A. At Fort Mason.

Q. Did you make application there?

A. Yes, sir.

Q. And they accepted you? A. Yes, sir.

Q. And you became a Civil Service employee?

A. Temporary.

Q. Temporary Civil Service employee?

A. Yes.

Q. And was your pay subject to various deductions that the government makes for social security and taxes? A. Yes, sir.

Q. And other deductions the government makes for annual leave and sick leave and things of that character?

A. They didn't—I don't believe they took out—Well, I was privileged for annual leave, yes, but I don't think they took out the retirement fund at that time. They took it out later.

Q. I see. And the situation under which you

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Cecil Bailey.)

first went to work for the government in July of 1950 and the circumstances under which you have worked for them continued to remain the same from that time until now? A. Yes.

Q. Is that right?

A. (Nodding affirmatively.)

Q. Who was your immediate superior in your work at July of 1950?

A. Captain Voortmeyer.

Q. Will you spell that?

A. Voortmeyer.

Mr. Harrison: Do you want me to spell it for you?

Mr. Resner: Go ahead.

Mr. Harrison: V-o-o-r-t-m-e-y-e-r. [7]

Q. (By Mr. Resner): Where is his station?

A. He's at Pier 2, Fort Mason.

Q. Fort Mason, San Francisco? A. Yes.

Q. Did he give you orders and instructions as to what jobs to go on, where to report for work?

A. Well, he gives us instructions to——

Mr. Ferguson: At what time, Mr. Resner?

Mr. Resner: In July of 1950.

A. (Continuing): He doesn't give us instructions as to what kind of work we are supposed to do. When we are alongside of a ship or going alongside of a ship we are either ordered by the boss longshoreman or somebody like that. I don't know. In other words, I am not the foreman of the rig. I have nothing to do with that.

Q. (By Mr. Resner): I understand that. But let me put the question to you this way, Mr. Bailey:

(Deposition of Cecil Bailey.)

Who sent you out on different assignments of work in July of 1950?

A. I think it was Mr. Cunningham had charge of the operators.

Q. Who is he?

A. I think he's Port Engineer there, I believe.

Q. For the Army? A. Yes.

Q. Well, let me ask you this question: When you came to work in July of 1950, you would report to work in the morning; is that correct?

A. That's right.

Q. Where would you report?

A. Report at Fort Mason; then we either go across the Bay to Outer Harbor, Oakland,—— [8]

Q. Yes.

A. ——and we have no definite spot to go to. It is different piers, wherever the crane is, or whatever ship needs the material that we have to load, then we are alongside that particular ship.

Q. When you went to Fort Mason in July of 1950 in the morning and reported to work, to whom did you report?

A. We report to the dispatcher there. We have a regular dispatcher.

Q. I see. And the dispatcher would tell you, "Now, this morning, fellows, go to Pier (so-and-so)"? A. That's right.

Q. To handle the rig for such-and-such a job?

A. That's right.

Q. Is that the way it would work?

A. Yes, sir.

(Deposition of Cecil Bailey.)

Q. And Mr. Cunningham was in charge of this dispatching office?

A. No, no, he wasn't. He is just in charge of the mechanical parts aboard the——

Mr. Ferguson: Now, Mr. Resner, I believe that this man is your witness, and I would request that you not be so leading, he being your witness.

Mr. Resner: I am not leading him.

Mr. Ferguson: I think you are.

Mr. Resner: This is by way of discovery.

Mr. Ferguson: You have not so noticed it and this deposition is not being taken for discovery purposes.

Q. (By Mr. Resner): Mr. Bailey, who was Mr. Cunningham?

A. I think he is the Port Engineer there. [9]

Q. The port engineer? A. Yes.

Q. Just what did he have to do with your work?

A. Well, he had the job of hiring us and getting the special rigs in operation.

Q. I see. And Captain Voortmeyer—Was that the name? A. Yes.

Q. Who was he, again?

A. I think he is the Port Captain down there.

Q. The Port Captain. Were there any other men at the office at Fort Mason who had any direction over your work in July of 1950?

A. Not that I know of, outside of the dispatchers who would tell us where to go.

Q. And do you know the names of the dispatchers at that time? A. No, I don't.

(Deposition of Cecil Bailey.)

Q. What relationship did Mr. Cates have to your work at that time?

A. He was the foreman.

Q. He was the foreman? A. Yes.

Q. Was he known by any other title?

A. No, not that I know of.

Q. Would he be known by the title of a Whistle Man or Signal Man or something of that kind?

A. Well, he is the foreman. He gives me the signal. He is the signal man and he is the foreman of the rig.

Q. I want to direct your attention to July 28 of 1950. Do you recall that day? A. Yes.

Q. Were you employed by the Army on that day? A. Yes, sir. [10]

Q. In what kind of a job?

A. Operator. Crane operator.

Q. What crane did you operate?

A. The BD-3031.

Q. That is the name of the crane, is it?

A. Yes.

Q. The number of the crane? A. Yes.

Q. What type of crane is it?

A. It was a Dravo.

Q. Say that again.

A. It was a Dravo. It is put out by the Dravo people. It has the blueprints on there that show that it is that particular rig.

Q. Would you spell the name for us?

A. Well, it's Dravo. There is no name on it.

Q. Just like it sounds? A. Yes, sir.

(Deposition of Cecil Bailey.)

Q. Now, was this crane attached to anything or affixed on anything? Was it a floating crane?

A. A floating crane; yes, sir.

Q. And what kind of a waterborne structure was it carried on?

A. It was just carried on a barge.

Q. On a barge. On July 28, 1950, where did you go aboard that barge?

A. Frankly, I don't know if we were over there all night or we moved over there that morning. I don't know if we moved alongside of that ship at that particular day or the day before. I just don't remember that.

Q. Well, do you recall at what place you got aboard the barge?

A. I'm not sure whether we went aboard at Oakland Army Base or over at Alameda.

Q. I see. Mr. Bailey, how did you get from Fort Mason to Alameda or Oakland?

A. We traveled—The Army furnishes the [11] transportation by bus.

Q. Army bus?

A. Or sometimes we go over on a towboat.

Q. I see. You either ride over in the Army bus or on the towboat? A. That's right.

Q. What kind of a towboat is it?

A. Well, it is a regular Army towboat.

Q. Does it tow the barge?

A. Yes, when it is needed.

Q. Do you recall that towboat towing this barge

(Deposition of Cecil Bailey.)

to the scene of this work on the day of the accident? A. No, I don't.

Q. Or the day before? A. No, I don't.

Q. Was the barge stationed alongside the Shawnee Trail when you came aboard the barge?

A. I'm not sure at that particular day that this happened.

Q. I am talking about the day of July 28, 1950.

A. Yes, I am not sure.

Q. Do you remember an accident on that day?

A. Yes, sir.

Q. Do you know at what hour of the day the accident occurred?

A. Yes, sir. Between 11:00 and 12:00, I believe.

Q. That is, at the noon hour?

A. Between 11:00 and 12:00.

Q. Well now, where was the Shawnee Trail docked at the time? A. It was in Alameda.

Q. What pier?

A. I don't know the number of the pier.

Q. Do you know Army Transit Depot No. 3?

A. I don't know if there are three or four. I know it was over in Alameda. [12]

Q. Do you know that pier?

A. No, I don't.

Q. Do you know at what pier the Shawnee Trail was docked?

A. No. I know it was in Alameda there, by the Naval Supply there, whatever they call it. I don't know. There are no numbers on the pier that I recall.

(Deposition of Cecil Bailey.)

Q. Was one side of the Shawnee Trail docked against the pier?

A. Docked against the pier, yes.

Q. Do you remember how you got aboard the barge? A. No, I don't.

Q. No recollection at all?

A. No. We moved around so much on different jobs, that particular morning I am not sure whether they come in there that morning with the barge or the barge was there overnight. I'm not sure.

Q. Well now, where was the barge located with regard to the Shawnee Trail on this occasion?

A. It was tied alongside of the hull of the Shawnee Trail.

Q. On which side?

A. I believe it was the starboard side of the ship.

Q. And would that be the side that was to the open water?

A. That's right. We were on the offshore side of the ship.

Q. You were on the offshore side?

A. (Nodding affirmatively.)

Q. Well now, how would you get aboard the barge under those circumstances?

A. Well, you would come over the ship and down on the barge.

Q. What means of getting aboard the ship did you employ? [13]

A. I just got through telling you awhile ago, sir, that I don't remember when we came aboard

(Deposition of Cecil Bailey.)

the barge whether we came aboard in Oakland and took the barge over that particular morning or not.

Q. You don't remember whether you rode on the barge to the scene of the job——

A. That's right.

Q. ——or whether you crossed the vessel and then descended to the barge?

A. That's right. Because we have moved around so much, that particular day I don't know whether we took the barge over there that particular morning that we done that work or we had the barge there the night before. I'm not sure on that.

Q. How big a barge was this, Mr. Bailey?

A. Well, it's capable of 65 ton.

Q. What are its dimensions?

A. 65-ton weight.

Q. What length and what width?

A. I don't know if it is 90 feet or not. I'm not sure of the dimensions.

Q. How high does the deck of the barge sit off the water? A. I'm not sure of that either.

Q. Do you know approximately?

A. Oh, I would judge about five feet, I believe. That is, the deck of the barge.

Q. The deck of the barge. At what part of the barge is the crane located?

A. I think it's off center. That would be a little on one end of the barge.

Q. How high is this crane or derrick?

A. Well, we have a 90-foot—96-foot boom on

(Deposition of Cecil Bailey.)

there; and the [14] height of the boom from the deck—When the boom is real high, I don't know exactly how high it is from the deck of the barge.

Q. You say it is a 96-foot boom?

A. Somewhere around in there, according to the blueprints. That is, from one block to the other.

Q. You are the crane operator?

A. That's right.

Q. On this occasion where did you sit, or where was your station?

A. I sat up in the cab. That's a little bit above the engine room. It's about, I would say, oh, 30 to 35 feet from the deck of the barge.

Q. Above the deck of the barge?

A. Yes, sir.

Q. Well now, with regard to the Shawnee Trail on this occasion, where was your cab or station with relationship to the deck of the Shawnee Trail? Were you above it or below it?

A. I was above the deck of the Shawnee Trail.

Q. Could you see the deck of the Shawnee Trail?

A. I could see this side (indicating). I couldn't see what was going on the other side, because they had all that mechano structure there.

Q. When you say "this side," you could see the offshore side? A. The side that I was on.

Q. That was the side that you were on. You couldn't see the inshore side because of the mechano structure?

A. Well, I could see the inshore side.

Q. You could see that? A. Yes.

(Deposition of Cecil Bailey.)

Q. On this occasion, what time did you get aboard the barge that [15] morning of July 28, 1950? A. I'm not sure.

Mr. Harrison: I will object to that as being asked and answered. He has said he doesn't remember when he got aboard the barge, whether he rolled over on it or crawled across the ship to get on it.

Mr. Resner: Your objection is in the record.

Q. (By Mr. Resner): What time did you get aboard the barge that morning of July 28, 1950?

Mr. Ferguson: Wait a minute. I instruct the witness not to answer.

Mr. Resner: You can't instruct the witness.

Mr. Ferguson: If I appear for him?

Mr. Resner: Are you appearing for him?

Mr. Ferguson: He is an employee of the United States government.

Q. (By Mr. Resner): What time did you get to work that morning?

Mr. Ferguson: I object to it.

Mr. Resner: You mean to tell me that it is not a proper question to ask him what time he got to work that morning?

Mr. Harrison: It has been asked and answered.

Mr. Black: No. He said he didn't know what time he got on the ship.

Mr. Resner: I am asking him what time he got to work that morning.

Mr. Harrison: He has answered that he doesn't remember. Go ahead. [16]

(Deposition of Cecil Bailey.)

Q. (By Mr. Resner): What time did you go to work on the Army Base?

A. You see, we have different times. Sometimes we are called in early and sometimes we ain't, and those things is one day or another; and this one particular day, I don't remember what time I went to work that morning or what time we were called in. Sometimes we are called in a half an hour early or an hour early. On that particular morning, I don't know.

Q. How long had you been working when the accident happened?

A. I believe we were in operation for a month. I am not sure.

Q. No. On the morning in question, how many minutes or hours had you worked when the accident happened?

A. Well, we worked until—I believe the accident happened around between 11:00 and 12:00. I'm not sure. I don't know the exact time we started.

Q. Do you know approximately how many hours or minutes you worked——

A. No, sir; I couldn't.

Q. ——aboard the barge before the accident happened?

A. No, sir; I don't. Not that particular day, no.

Q. Did you say that you had worked this barge for a month?

A. We got it in operation. I believe it was in operation—I'm not sure. I believe it was in operation a month before the accident.

(Deposition of Cecil Bailey.)

Q. I see. And during the month before the accident that you operated the barge, did you work on it under the same circumstances that you did on the day of the accident? [17]

A. The same circumstances; yes, sir.

Q. Were you ever under the situation where you would join the barge which would be bringing planes down from up the River, towed down?

A. I don't know what you mean, sir.

Q. Were you aboard that barge when it was towed into its station alongside a vessel by a tugboat?

A. Occasionally, yes. Sometimes we have; yes, sir.

Q. And from what places would you start with the tug on those occasions?

A. It was wherever the barge was; wherever it was located the night before.

Q. Around the Bay? A. Yes, sir.

Q. Would you ever stay on the tug or the barge overnight?

A. No. We have two shifts on there.

Q. 8- or 12-hour shifts?

A. No. We work eight and ten hours.

Q. I see. At the time of the accident what kind of cargo were you working?

A. We were handling those jet airplanes.

Q. And where were the jet airplanes located on the barge?

A. They were on a service barge alongside of us, on the offshore side of us.

(Deposition of Cecil Bailey.)

Q. Another barge alongside of you?

A. Yes.

Q. Were there any planes located on your barge? A. No, sir.

Q. Did you see the service barge with the jet planes on it being brought into station alongside of you, or was it there when you [18] came to work that day?

A. I am not directly sure on that question either.

Q. Do you know how many planes were on the service barge that you were to load on July 28, 1950?

A. Either twelve or thirteen; I'm not sure there.

Q. Do you know how many jet planes you had put aboard the Shawnee Trail before the accident?

A. I believe it was twelve.

Q. You had already put twelve aboard?

A. Yes, sir. Or I think that that was the twelfth one that went aboard. I'm not sure.

Q. Would you please explain to me, Mr. Bailey, just how this floating crane operates in connection with loading a plane aboard a vessel?

A. Well, I take orders from the boss, that is, you call him a whistle man. He gives me the signals to pick the plane up and take it aboard the ship.

Q. Who would that be?

A. Mr. Charlie Cates.

Q. And where would his station be located?

(Deposition of Cecil Bailey.)

A. He would be aboard the ship.

Q. The Shawnee Trail? A. Yes, sir.

Q. At the rail?

A. Well, he would be within sight of me. I'm not sure. He doesn't always be at the rail.

Q. I see. Go ahead and explain the operation.

A. I pick the plane up, proceed across the ship with it, and boom down and put the plane in the position where they wanted it. [19]

Q. Now, who would hook onto the plane on the service barge?

A. The—I'm not sure on that question, who we had hooking on on that particular day.

Q. Was it another Army employee, part of your crew?

A. I am not sure whether the Army employees were hooking on or not. I'm not sure on that.

Q. How many Army men did you have aboard your floating barge and crane?

A. We had two. Two slingers and the foreman and myself. Four altogether.

Q. What do you mean by the "slingers"?

A. They are riggers. They move the barge around and take care of the slings and the equipment aboard the barge.

Q. Do you remember their names?

A. Yes, I know their names.

Q. Would you state them?

A. I work with them.

Q. I beg your pardon?

A. Yes, I know their names. I work with them.

(Deposition of Cecil Bailey.)

Q. Will you give me their names?

A. I want to make sure that they were on there at the time. I'm not sure exactly which. We had laid some guys off before that. I am not sure which slingers were there at that time. So therefore I wouldn't like to make a statement on their names.

Q. Can you give me your best recollection, Mr. Bailey? A. Well, I'm not sure, sir.

Q. The crew consisted of four: you, the whistle man or boss, who was Cates, and these two slingers, as you called them? [20] A. Yes.

Q. At what part of the plane is the hook-on made?

A. Well, I think there is—I think the hook-on was made on the body of the plane. That is, it's made on the body of the plane. That is, up on the top, just on one side of the fuselage—if that is what you call it.

Q. How many hooks are there?

A. There are three.

Q. Or how many lines down? A. Three.

Q. Three. Two on the body and one on the tail? A. Similar to that; yes, sir.

Q. And you don't recall who hooked on on the day of this accident? A. No, sir; I don't.

Q. During the month that you had had this barge and crane in operation, who had been doing the hook-on?

A. Well, we had—There was one slinger by the name of Eddie Sennett, and I don't know the other guy's name.

(Deposition of Cecil Bailey.)

Q. Well, in the month that you had been working this barge and crane, Mr. Bailey, had your slingers also been hook-on men?

A. No. They don't touch any equipment on any of those service barges. They are not supposed to hook on.

Q. Do the service barges come down with personnel aboard them?

A. No. They get their men from aboard the ship.

Q. On the service barges? A. Yes, sir.

Q. Well now, do you recall the plane that was involved in the accident, Mr. Bailey?

A. I don't recall the particular plane; no, [21] sir.

Q. Well now, do you recall that plane being hooked on, or being brought up and over and aboard the ship and landed?

A. Yes, I recall that.

Q. Did you get your signals to do that from Mr. Cates? A. Yes, sir.

Q. That is, to lift it, carry it over and drop it down; is that right? A. Yes, sir.

Q. Well now, would you tell me, Mr. Bailey, in your own words just how the accident happened?

A. Well, I picked the plane up as the signal was given and raised it up and got it high enough to clear the rigging on the ship, took it over to where they wanted it and lowered the plane in the position they wanted it, which was about two to two and a half feet from this landing platform where

(Deposition of Cecil Bailey.)

they were going to land it, and it held there for about three to four minutes. Then I got a signal from Mr. Cates, which was four whistles, to boom down; and proceeding to boom down, I put the auxiliary, which the plane was slung from,—put the auxiliary friction in so I could hold the load in one position and to boom down at the same time, in other words, to keep the plane on the same level and float the plane where he wanted it. So by pulling the friction clutch and releasing the brake that the load was hung on, in other words, the friction holds the load. I pulled the friction in in order to hold the load, and as I proceeded to boom down I looked out the window to get a better look to see that the boom was away from the gear, that is, the ship's gear, the stays and what-have- [22] you; and as I reached out the window, I had a pair of coveralls—I was working down below, oiling the engines—and the sleeve of the coverall caught on the friction and I pulled the friction forward; and as it done that, the plane dropped the distance of two and a half to three feet, and I immediately pulled the friction back on and I held the plane before it took its full weight.

Q. Now, you say that you were looking out the window?

A. I went to—I went to look out the window; in other words, to get a better look. And as I did, my sleeve caught on the friction and released it.

Q. Were you trying to open the window, Mr. Bailey?

(Deposition of Cecil Bailey.)

A. No, sir. The window was already open.

Q. And was this the window on the side that faced the vessel?

A. It is the window directly in front of me.

Q. Didn't you have a good view of the plane you were landing?

A. There was a lot of ship's gear. In other words, the overhead of the cab isn't all glass. In other words, I look up to see that the boom is clear of the rigging.

Q. You mean the crane boom?

A. The crane boom; yes, sir.

Q. On your barge? A. That's right.

Q. And you were going to look out the window to see that that was clear of the ship's rigging?

A. Yes.

Q. Did you have to look out the window in order to get a good view?

A. I do occasionally. Sometimes if the foreman overlooks things, I look, too.

Q. I see. This friction lever that you speak of was the lever [23] which held the plane in place; is that right? A. That's right.

Q. And how far from where you sat from your chest would this friction lever be?

A. It would be approximately about here (indicating).

Q. Would you estimate that distance?

A. Oh, I would say not over two feet.

Q. What do you say you struck the friction lever with?

(Deposition of Cecil Bailey.)

A. With the sleeve of my coveralls. It hooked in the friction lever and released it.

Q. What kind of coveralls were you wearing, Mr. Bailey? A. Regular khaki coveralls.

Q. I see. A. Army issue.

Q. And could you draw for me a sketch of the friction lever?

A. Well, it's—This is about the length of the lever here (indicating). This pulls this way (indicating).

Q. You are indicating toward you?

A. Yes.

Q. The little——

A. It is like a friction valve.

Q. This little object that you have drawn here?

A. Yes.

Q. Will you label that. Write down what it is.

A. Well, that was the auxiliary hoist, and here is the——

Q. Which is the auxiliary hoist, Mr Bailey?

A. This one here (indicating).

Q. Do you want to write "auxiliary hoist"?

A. And the main hoist. This "EX"—that is what is on the auxiliary hoist. [24]

Q. "EX" is on the auxiliary hoist?

A. That's right.

Q. And that is the one on the lefthand side of the sketch here? A. Yes.

Q. Is this oblong object you have drawn the panel board?

A. No. That is your friction, the front for this

(Deposition of Cecil Bailey.)

particular hoist. In other words, this is the main hoist and the boom hoist (indicating).

Q. Do you want to mark those as they are marked? A. Yes.

Q. Now, tell us again so that we won't have any question about it. "EX" is what?

A. Auxiliary hoist. That is what we have on the auxiliary hoist.

Q. And its function is what?

A. They call it the "whip." We call it the "whip." And this is the main hoist and the boom (indicating).

Q. What is the function of the auxiliary hoist? What is it supposed to do?

A. Well, the idea of the auxiliary hoist is, it's a small load line. We are not supposed to put on over fifteen ton.

Q. I see. And "M" is the main boom?

A. Yes, that is the main hoist.

Q. And what do you carry with that?

A. About 65 ton.

Q. And you have got that marked "M." And what are these next marks you have here, Mr. Bailey? A. That is the boom.

Q. Oh. You have "Boo." A. Yes. [25]

Q. You want an "m" there, don't you?

A. Well, it could be.

Q. And what is it supposed to be?

A. That is the boom.

Q. The boom? A. That's right.

Q. All right. Now, on which lever did you catch?

(Deposition of Cecil Bailey.)

A. Catched on the whip over here.

Q. You caught it on the whip? A. Yes.

Q. Is that the lever that is to your left as you face it?

A. Yes. As we face it, it is on my left.

Q. And would you tell me again, then, what you had it on for at the time of the accident?

A. I always put that on in case he wants to hold the load. In other words, in order to hold a load the boom is put down by a mechanical brake. That is a mechanical brake on this side (indicating). You see, you lower the boom on a mechanical brake, and this auxiliary hoist has to be on in order to raise the load as the boom is lowered down.

Q. Are there any foot brakes?

A. We have two foot brakes; yes, sir.

Q. Do you use them?

A. We do. But you have to take the foot brake off when you put your auxiliary hoist on in order to move the machinery. In other words, you lower it down or you raise it.

Q. So we will get your station in this cab right, were you at right angles to the vessel's side or did you face the vessel's [26] side as you were loading this plane? You yourself.

A. Well, I was practically—Well, I wasn't directly across the ship. I think I was veered a little bit on the right. I was more centered on the right of the ship, in other words. I was more right than I was left. I wasn't directly across the ship.

(Deposition of Cecil Bailey.)

Q. Well now, you and I are facing each other here, Mr. Bailey.

A. I would be in the position that that gentleman (indicating Mr. Magana) is sitting.

Q. Mr. Magana. You were at an angle?

A. Yes.

Q. About a 45-degree angle to the ship. But these levers were right in front of you?

A. Yes, sir.

Q. Is that correct?

A. Well, I am talking about the position of the crane at the same time as I was sitting.

Q. Yes, that's right. The crane would be at that angle? Toward the ship, that is. A. Yes.

Q. Is that right? A. Yes.

Q. And you, therefore, and these levers in front of you would be at the same angle?

A. That's right.

Q. You said that the signal to drop the load was four whistles.

A. Four whistles is to boom down.

Q. Boom down?

A. That is to boom down.

Q. What are the whistles to hold?

A. You see, whenever he gives me four whistles to boom down, when I have got a load on there, I get ready to boom down. In other words, I put the auxiliary hoist, or put the friction on, [27] whichever hoist I am using.

Q. You had already done that? You had already done that at this time?

(Deposition of Cecil Bailey.)

A. Yes. And that holds the load, see. Now, before I got ready to boom the load down, I proceeded to look out the window to see that the boom was clear of all running gear, that is, stays or what-have-you there. And as I done that, my sleeve caught on the friction lever and released it, and I pulled it back on immediately.

Q. Give me the other signals besides the four whistles that the whistle man would use.

A. Well, the order of a procedure like that: he would give me four whistles to boom down, and I would boom down; and while I am booming down, he would give me one signal to raise the load.

Q. One whistle? A. Yes.

Q. To raise the load? A. Yes.

Q. What are——

A. Or if he could see me, he would give me a hand signal to pick it up.

Q. What are the whistles to carry the load from the service barge up and then over the side of the ship? A. One whistle.

Q. From Cates, the whistle man?

A. No. They would give signals on the service barge. Whoever was working there would give them.

Q. They would give you the whistles there?

A. They would either give me a whistle or a hand signal.

Q. Oh, I see. To take it up after it was hooked on? [28] A. Yes.

Q. And was there any particular signal to bring

(Deposition of Cecil Bailey.)

the load over from the service barge to the deck?

A. No. Usually I would pick it up, bring it around, and clear the rigging myself.

Q. And would the whistle man direct you as to where to set it down on the ship's deck?

A. Yes.

Q. And then where would the whistle man stand at that particular time?

A. Well, there was no definite spot for him to stand. He would be in the position to watch the plane as it come over the ship, to be sure that it wasn't going to hit anything, and he would give me a signal, if it did—before it did.

Q. Cates, the whistle man, was the man who gave you all your orders? A. Yes.

Q. Did anybody else give you orders?

A. No.

Mr. Resner: Mr. Ferguson, do you have photographs of the crane?

Mr. Ferguson: No, I haven't.

Mr. Resner: Do you know whether they have been taken?

Mr. Ferguson: Personally, I don't.

Mr. Resner: I assume you will have no objection to furnishing us with them or permitting us to take pictures. Or do you want us to go and get an order?

Mr. Ferguson: We can talk that over.

Q. (By Mr. Resner): Can you describe that crane in any more [29] detail by name, number and description, Mr. Bailey, than you already have?

(Deposition of Cecil Bailey.)

A. No, I can't.

Mr. Black: That number appears right on it?

The Witness: It appears right on the crane.

Q. (By Mr. Resner): It appears right on the crane? A. Yes.

Mr. Black: Is that crane always affixed to the same barge?

The Witness: I'm not sure whether that was the number before or not.

Mr. Black: I mean, has it been ever since?

The Witness: Ever since it has been the same; yes, sir.

Mr. Resner: Let me ask one or two more questions, Mr. Black.

Mr. Black: Excuse me. I was just trying to develop that.

Mr. Resner: It is perfectly all right, John. I just want to finish this, and I am practically through now.

Q. (By Mr. Resner): Do you know whether that barge was U. S. Army BD-3031?

A. What was that number again, sir?

Q. BD-3031.

A. That is BD-3031. I said it.

Q. That was it?

A. That was the number on it.

Mr. Ferguson: "BB" or "BD"?

The Witness: BD.

Q. (By Mr. Resner): BD-3031. That was it, wasn't it? A. Yes, sir.

Q. Where did that number appear?

(Deposition of Cecil Bailey.)

A. It appeared on each side of the barge—on each side of the cab. [30]

Q. You had worked on this barge on a number of days before the accident, hadn't you? The same barge. A. Yes.

Q. And this crane was affixed to that barge?

A. Yes.

Q. In other words, they didn't move it from that barge to another barge? A. No.

Q. Did you keep a time record in July of 1950? That is, a timebook as to where you worked and what jobs you worked on.

A. No. The foreman. I have nothing to do with that whatsoever.

Q. But Cates keeps such a timebook?

A. He has the timebooks and he knows the hull number of the barge. That is his. I have nothing to do with it.

Q. He would know where you went to work and when you went to work; is that right?

A. He would know more of the details than I would. He is in complete charge.

Q. How far did you say the plane dropped, Mr. Bailey?

A. Approximately two to two and a half feet.

Q. Did you see it strike Mr. Luehr?

A. No, sir. I didn't see anybody around the plane at all. In fact, I didn't know there was anybody hurt until the plane was raised up, and until a minute or so after the plane was raised up I never knew there was anybody hurt.

(Deposition of Cecil Bailey.)

Q. Can you describe the speed of the drop of the plane at that time? A. No, I couldn't.

Q. Do you know how much those planes weighed? A. I am not sure of that either.

Q. Do you know approximately?

A. I know they are awfully [31] light compared to the equipment, the rig.

Q. Do you know approximately how much they weighed? A. No, sir; I don't.

Q. After your sleeve had caught the lever and released it, causing the plane to drop, just what did you do to stop it?

A. As my sleeve caught in the friction, I pulled it right back on again.

Q. You grabbed ahold of that same lever and pulled it back on? A. Yes, sir.

Q. Were you looking out of the cab window at the point where you got your sleeve caught on the lever?

A. I was looking right out the cab window; yes, sir.

Q. What were you doing with your hand at the time that you were looking out the window that caught on to the lever?

A. I was putting it on the ledge of the window to look out. In other words, I took my hand and put it on the ledge of the window to look out.

Q. Which hand was it?

A. This hand (indicating the left hand).

Q. The left hand. Are you right- or left-handed?

(Deposition of Cecil Bailey.)

A. No, sir; I am right-handed. I think this is my right hand.

Q. What hand did you use to operate the levers?

A. I used my right hand on the boom levers.

Q. I see. Well, did you use your right hand on the other levers too? What did you call the middle one, again? The main hoist?

A. The main hoist. I used my left on those there. [32]

Q. What did you use on the "EX"?

A. I used my left.

Q. Do you want to initial this, Mr. Bailey and we will offer it for identification on the deposition.

A. Initial what?

Q. That piece of paper. A. Initial it?

Q. Yes. What are your initials? C. B.?

A. Yes.

Mr. Resner: Mr. Conklin, I will hand you this sketch and ask you to mark it for identification on this deposition.

(Freehand sketch drawn by Witness Bailey was marked for identification Libelant's Exhibit No. 1.)

Mr. Resner: Those are all the questions I have at this time.

What procedure do you gentlemen want to employ to examine the witness? You are impleaded, John, and I suppose Mr. Cooper, you are.

Mr. Harrison: We are the No. 1 respondent.

Mr. Resner: And the government has responded here. So go ahead.

(Deposition of Cecil Bailey.)

Cross-Examination

By Mr. Harrison:

Q. Mr. Bailey, you say that you have been operating cranes of various natures for twelve or fifteen years; is that right? A. Yes, sir.

Q. And have you ever had any other serious accidents? A. Never. [33]

Mr. Black: We will object to that upon the ground it is improper.

Mr. Resner: I object to that.

Mr. Harrison: I can cross-examine this witness.

Mr. Black: And we can also object.

Mr. Resner. You can cross-examine the witness but you cannot ask improper questions.

Q. (By Mr. Harrison): Mr. Bailey, this friction on the auxiliary hoist that you have spoken of is operated by air pressure, is it not?

A. Yes, sir.

Q. And when the friction is released, does the air pressure go out of it immediately or does it slowly go out?

A. Well, it goes out—When there is any strain on it, it goes out pretty well immediately.

Q. But isn't it true that the friction actually holds the drop of the load momentarily?

A. Yes, sir.

Q. So that it doesn't drop as though it were just a free drop? A. No, sir.

Q. Well, Mr. Bailey, in your opinion why were

(Deposition of Cecil Bailey.)

they using the derrick barge instead of the ship's gear on this?

Mr. Resner: I object to that.

Mr. Black: We object to that.

Q. (By Mr. Harrison): All right. What was the nature of the gear aboard the ship?

Mr. Black: If he knows.

Mr. Cooper: I object to it upon the ground that a proper [34] foundation has not been laid.

Q. (By Mr. Harrison): Did you see the gear aboard the Shawnee Trail?

A. I didn't see the gear.

Q. You saw the booms and what they had, did you not?

A. Well, all they had looked like to me like it was small hose booms. That was all I saw. They don't have gear on there like they do on the regular ship. They were small booms. I think they used them for gangways or the ship's hose for hooking up oil or something like that.

Q. Were the booms aboard the ship sufficient enough to load this cargo?

A. I don't think they were long enough, no, to reach from the ship to the barge and pick the planes up, no.

Q. Is it true that the derrick barge which you operated is more of a precision instrument than the ordinary booms aboard a tanker?

A. Yes, I would say that.

Q. And the loading of these planes requires quite a bit of precision, does it not?

(Deposition of Cecil Bailey.)

A. Yes, sir.

Mr. Harrison: I think that is all.

Q. (By Mr. Black): You just testified, Mr. Witness, that the friction, presumably the friction of the brake, will momentarily hold a load after the air has been released; is that correct?

A. The friction won't hold the load after the air is released, no.

Q. While the air is being released, then. Is that your testimony?

A. Yes. That when the friction is put into gear, in other words, it injects the air into the cylinders [35] and it holds the load.

Q. Yes. And this air is released how?

A. Well, it's released through a bypass through the bottom of the cab. In other words, it is released through an exhaust affair.

Q. And that leads directly to the friction lever upon which your sleeve caught; is that correct?

A. Yes.

Q. That bypass? A. Yes.

Q. And the air is expended immediately when that bypass is opened?

A. Well, it takes practically immediately, yes.

Q. For all practical purposes it is at once, isn't it?

A. Well, I would say not almost at once but fairly.

(Deposition of Cecil Bailey.)

Q. Well, is it more than a half a second?

A. Well, I can't—I can't state any time on it, no.

Q. Well, did it hold this load?

A. Yes. It holds any load that is fifteen ton.

Q. Did it hold the load up and from falling? This so-called friction. A. Yes, sir.

Q. For how long?

A. Well, I had the brakes on all the time. In other words, the only time I put the friction in is when we are going to boom across the ship and hold the load.

Q. Yes.

A. Then you have to release the brake after the friction is in in order to raise the load and lower the boom.

Q. Well, how fast did this load drop? [36]

A. Well, I couldn't describe it. I'm not sure.

Q. Did you see it drop?

A. I just seen it after it got just about down to the bottom. In other words, the friction is already on, just put it on. In other words, it was released and put back on again.

Q. Then is it your testimony that you didn't actually see the airplane drop?

A. No, I didn't actually see it drop. No, sir.

Q. What do you mean by "exactly"? Did you see it drop or didn't you?

A. Well, I could see the plane just about when it hit; yes, sir.

Q. When it hit where?

(Deposition of Cecil Bailey.)

A. It seems like it hit something. I am not sure what it hit.

Q. Did it hit the deck?

A. I don't know what it hit.

Q. Now, I think you testified you went to work for the Army about July the 7th or 17th, 1950. Is that correct? A. Yes.

Q. And you are still employed by them?

A. Yes.

Q. Have you been employed by anyone else in the meantime or during that period?

A. You mean while I am working for the Army?

Q. Yes. A. No.

Q. Have you had any other employer since July the 7th or 17th, 1950, other than the United States Army? A. No.

Q. Now, you have related here or testified with respect to a dispatcher and a dispatching office that is located at Fort Mason. Are the people in that office employees of the Army? [37]

A. I believe they are. I'm not sure.

Q. Now, this crane, BD-3031, was the property of the United States Army, was it?

Mr. Ferguson: If you know.

A. I don't know whether it is or not.

Q. (By Mr. Black): Was there anything on it to indicate the ownership of it?

A. Outside of BD-3031.

Q. That's all that is on it; is that correct?

A. That is correct.

(Deposition of Cecil Bailey.)

Q. But it is used by the Army all the time, is it not? A. Yes.

Q. And it is still in use by the Army?

A. I think it is, yes.

Q. Now, you testified that you were above the deck of the ship in your station or at your station?

A. Yes.

Q. Were you above the mechano deck on the ship?

A. Where I was sitting I was above, I imagine fifteen to twenty feet.

Q. Above the top of the mechano deck; is that correct? A. Yes.

Q. What were your normal hours of work?

A. Well, we worked usually from 7:30 in the morning or 8:00 o'clock in the morning until 6:00 or sometimes 4:30.

Q. And would that be five days a week?

A. Five days a week; yes, sir. Sometimes six, seven days a week.

Q. Now, were you paid by the hour, the day, the week or the [38] month?

A. We are usually paid for a 40-hour week.

Q. You are paid for a flat 40-hour week?

A. Yes.

Q. Whether or not you work 40 hours, do you still get paid for 40 hours' work?

A. No. If we don't work, then we don't get paid.

Q. Then you are paid by the hour; is that correct?

(Deposition of Cecil Bailey.)

A. Well, I'm not sure on that question.

Q. Well, have you ever done less than 40 hours' work in a week while working for the Army?

A. No, I don't believe we have.

Q. Have you ever been paid by anybody other than the Army since you went to work for the Army? A. No, sir.

Q. Do you know the ownership of the barge from which these airplanes were being lifted? The so-called service barge.

A. The ownership of which barge?

Q. Of the service barge upon which these airplanes were located. A. No, I don't.

Q. Were they Army airplanes?

A. I'm not sure of that, sir.

Q. They were jet airplanes, were they not?

A. Well, I'm not sure whether they were jet. That's just hearsay on my part. I'm not sure of that.

Q. I see. Now, in the course of your work did you ever take orders from anybody other than Mr. Cates? A. No, sir.

Q. He gave you all your directions and orders; is that correct? [39] A. Yes, sir.

Q. To whom were you immediately responsible? Mr. Cates? A. That's right.

Q. Anybody else? A. No.

Q. Now, Mr. Cates is the man that you referred to in your direct testimony here as the whistle man; is that correct? A. Yes.

Q. They are one and the same thing?

(Deposition of Cecil Bailey.)

A. Yes.

Q. Now, did the Army have special slings and hoisting equipment for these airplanes?

A. I'm not sure whether they do or not, sir. I believe they come with the bridle already attached to them. I think——

Mr. Ferguson: Just state what you know and not what you think.

Q. (By Mr. Black): You are trying to recall. State your best recollection.

Mr. Ferguson: He can state what he knows and not otherwise.

A. I wouldn't know.

Q. (By Mr. Black): How many airplanes do you think that you have lifted in the course of a year? A. I'm not sure, sir.

Q. Can you give us any estimate at all, sir?

A. No, I can't.

Q. Do you think that you have lifted more than a hundred? A. I am not sure. [40]

Q. Do you think that you have lifted twelve?

A. I don't know.

Q. Do you know whether you have lifted twelve?

A. Yes, I know I have lifted twelve. Yes.

Q. I beg your pardon?

A. I know we have lifted a lot of planes over there.

Q. Do you know whether you have lifted any since then?

A. Yes, I know I have lifted planes since then.

Q. Do you know on how many occasions?

(Deposition of Cecil Bailey.)

A. I am not sure, sir.

Q. It might be only one?

A. We have loaded several planes since. I know that, but I don't know exactly how many.

Q. Now, you say that Mr. Cates will give you the four whistles to boom down? A. Yes.

Q. That was customary, was it?

A. That's right.

Q. And Mr. Cates was your foreman?

A. Yes.

Q. Now, who on these service barges will give you your orders to start up?

A. Well, it would either be Mr. Cates if he was in the vicinity there or seeing something wrong, or was waiting on a plane or something, he would give me the signal; but if they were ready all the time, why, usually the boys that hook on, they look around the plane and see if it is all clear, and they give me a hand signal.

Q. That would be one of the sling men?

A. Yes, it would be the sling men or the longshoremen, if they were there, or whoever was hooking on. [41]

Q. Do you know whether any longshoremen were there?

A. I'm not sure who was there this particular day.

Q. Then you don't know who gave you the signals on this particular day; is that correct?

A. That particular day I don't know, sir.

Mr. Black: I think that's all.

(Deposition of Cecil Bailey.)

Q. (By Mr. Cooper). Mr. Bailey, I am not sure that I understand this juggling operation you were attempting. You have testified that you received certain whistles which constituted directions to you as to what to do? A. Yes.

Q. Now, just what did you interpret those signals to mean that you were to do?

Mr. Ferguson: Which signal are you referring to?

Mr. Cooper: These whistles. First the four whistles and then the following single whistle.

Q. (By Mr. Cooper): What was your belief that those whistles were intended to direct you to do?

A. Well, the signal—You mean in order to pick the plane off the barge or avoid the ship?

Q. We will go down to the point, as I recall the testimony where you had hung the plane somewhere above the mechano deck. Is that right?

A. That's correct.

Q. Is that correct? A. That's right.

Q. And I think you testified that you had allowed it to rest there without movement some three or four minutes; is that correct? A. Yes. [42]

Q. And then you got four whistles?

A. Yes, sir.

Q. And then after that you got a single whistle?

A. No, I didn't get no single whistle.

Q. Then you got four whistles?

A. I got four whistles to boom down and float the load away from me; in other words, to float it where it was supposed to go.

(Deposition of Cecil Bailey.)

Q. And that operation, then, that you interpreted those whistles to direct you to do was to hold; that while you were lowering the boom——

A. Yes, sir.

Q. ——you were to nevertheless, by pulling up on what I will call the fall, maintain the level of the plane? A. Of the plane; yes, sir.

Q. I see. Now, had you ever performed that operation before? A. Yes, sir.

Q. Had you ever performed that operation on this day in connection with this ship?

A. You mean the day that this happened?

Q. That's correct?

A. Yes. We loaded those planes that day, yes.

Q. Do you mean to tell me that every plane you loaded that day, you performed that operation of loading in exactly this same way? A. Yes.

Q. That is, you let it come to rest for three or four minutes and then waited for a signal to boom down? Is that what you are telling us?

A. That's right. I am waiting for a signal. I don't know what kind of a signal he is going to give me, whether it is to boom down or lower the load or raise [43] the load.

Q. I think you misunderstood my question. My question was, Did you get the signals that required this precise operation on a prior occasion that day? That is, the operation I have in mind is lowering the boom and at the same time maintaining the level of the load. A. Oh, yes, sir.

Q. You had done it before?

(Deposition of Cecil Bailey.)

A. Yes, sir. I have done it before many times.

Q. I am talking about this particular day.

A. Yes, sir.

Q. How many planes had you loaded that day?

A. I believe it was twelve planes, I believe.

Q. And you mean——

A. Twelve or thirteen planes.

Q. You say "many times." Do you mean as many as three or four times?

A. Well, we don't always have to float the load. Sometimes the load is in the right spot.

Q. I see. Well now, isn't this the truth of the matter: You don't recall whether you ever performed that particular operation in that way before?

A. We do that several times in any day we work.

Q. Then your testimony is that you think you probably did it before because you had done it on other jobs; is that right?

Mr. Ferguson: That was not his testimony. He is talking about this day that he loaded the twelve planes and that he had done this same operation similarly on the twelve planes.

Q. (By Mr. Cooper): Isn't it a fact that you don't remember whether [44] you did this same operation prior to the time of the accident on that particular day?

A. I just stated that I had done the same operation on those planes at that particular day.

Q. But you don't know how many; is that right?

(Deposition of Cecil Bailey.)

A. No, I don't know how many. I take a lot of signals and I am moving a plane in all directions, and I can't remember all the signals that was given on one day.

Q. I am confining you, of course, to the particular operation where you got it above the mechano deck and then attempted to comply with the boss' directions as to what you were to do with it, to be perfectly frank about it. Now, you don't remember whether you did that particular kind of operation before that day or not; is that right?

A. I have done the same thing before that.

Q. I am talking about this very day.

A. On that particular day.

Mr. Ferguson: I will object to that. The question has been asked and answered four or five times.

Mr. Cooper: I think the way he qualified it——

Mr. Harrison: You qualified it, Mr. Cooper. I don't believe the witness did.

Mr. Cooper: Read the question and answer, please.

(Question and answer read.)

Q. (By Mr. Cooper): How many times?

Mr. Ferguson: That question has been asked and answered [45] several times. The number of planes that he loaded. I object to it on that basis.

Mr. Cooper: All right. We will try it again, to see if his answer is the same as the one before.

Q. (By Mr. Cooper): How many?

A. I don't know for sure. Probably three or

(Deposition of Cecil Bailey.)

four times. I'm not sure. I take signals all day long. I can't remember all the signals that he has given in one day.

Q. That operation, as I get it, required lifting up on the cargo fall, I will call it,—Do you know what I mean by cargo fall? A. Yes.

Q. (Continuing): ——lifting up on the fall and at the same time lowering the boom?

A. Yes, sir.

Q. That is, you had to do two operations at the same time? A. Yes, sir.

Q. And will you tell us again just how you managed that?

A. Well, in other words, to keep the load at the same level you have to put the friction in on the small fall, that is, the whip or the auxiliary. That's what the load was slung from. You have to put the friction in on that and lower the boom with the other hand, and keep it at the proper level as you lower it—at an even level.

Q. Well now, Mr. Bailey, what you attempted to do, then, was to hold that load, that is, to prevent the fall from running out; that is correct, isn't it?

A. Hold the load. [46]

Q. In other words, you held the fall just exactly where it was, or at least that is what you attempted to do; is that right? In other words, that there was no movement on the drum as far as the fall is concerned?

A. That is the fall on the whip, yes.

Q. I am not sure that I mean on the whip. You

(Deposition of Cecil Bailey.)

mean that that is similar to a drum arrangement which you revolve to let it up or take it up; is that right? A. Yes.

Q. So what you attempted to do was to hold that fall absolutely stationary, was it?

A. Yes.

Q. And at the same time lower the boom?

A. Yes. That would drift the load to where he wanted it.

Q. Now, as a matter of fact, in your experience didn't you find that if you lowered that boom and held the fall stationary, it would have the effect of lowering the load?

A. Not too fast, no. You heave the fall up at the same time. In other words, you keep the load at a certain level.

Q. I thought you just told us that you held the friction in so that you would hold the load where it was.

A. No. You put the friction in in order to raise the load as the boom is lowered.

Q. I thought you held it in sort of a brake arrangement so that the friction was on and held your drum.

A. No. When you put the friction in, you put that in for the purpose of raising the load and lowering the boom by manual brake. [47]

Q. Do you mean that? You put the friction on to engage it? A. Yes, sir.

Q. That is what you meant, then: to engage it?

A. Yes.

(Deposition of Cecil Bailey.)

Q. And not to hold it like you would hold it with a brake?

A. Well, you put the friction in and then use your power throttle to heave the load up while you are lowering your boom by manual brake.

Mr. Black: Pardon me. Off the record.

(Remarks outside the record.)

Q. (By Mr. Cooper): Now, Mr. Bailey, when you put what you called the friction on, which is an engaging gadget, did you have to hold it in place—— A. No.

Q. ——in order to keep from jumping out?

A. No, you don't have to hold it in place.

Q. Did it go into a notch?

A. No. It goes all the way over. It is inserted all the way over to one spot.

Q. It is inserted all the way over to one spot?

A. Yes, as far as it goes.

Q. I will ask you again. What keeps it in that place so that it goes all the way over to one spot?

A. Well, it stays there. I guess air pressure holds it down.

Q. You really don't know what the mechanical arrangement is, then; is that correct?

A. Well, it acts like——

Q. You said you guessed.

A. ——it is a regular lever like a valve. When you pull it to you, it stays in the direction [48] it is put in.

(Deposition of Cecil Bailey.)

Q. I thought you said you put it all the way over. Now you speak of pulling it to you. Which physical operation is it?

A. In other words, I pull the lever to me. That engages the air friction.

Q. I see. You pulled it to you?

A. Yes, sir.

Q. And that engaged it? A. Yes, sir.

Q. And is that the knob or the little lever that you caught your sleeve on? A. Yes, sir.

Q. How do you know you caught your sleeve on that, Mr. Bailey?

A. Well, as I put my hand through the window I could feel it. Then when I felt it, I pulled it right back.

Q. You mean you pulled it right back and still, in that fraction of a second, the load lowered?

A. Yes, sir. If it would have been any higher it wouldn't have hit the deck.

Q. Now, let's not try to reconstruct it. I am not asking you what you think happened. That, counsel will agree with me, is not admissible.

Then as soon as you felt your sleeve engage there, you pulled it right back; is that correct?

A. Yes, I did.

Q. And you weren't looking at the load that particular moment, though?

A. I was looking up at the dock to see if the boom was out of the way.

Q. But this movement of catching and pulling back on it was [49] practically instantaneous, was

(Deposition of Cecil Bailey.)

it? I mean, you were aware that you were doing a dangerous thing and you pulled it right back?

A. Yes, sir.

Q. And then I think in answer to Mr. Black's question you said you thought you saw it hit something after it had already fallen. Is that a correct statement of your testimony? A. No, sir.

Q. Tell us what is correct, then.

A. Well, I'm not positive if I just seen the plane before it landed or not.

Q. I see. At any rate you do know that when your sleeve engaged this little knob or lever, you were looking up at the gear on the dock?

A. Yes.

Mr. Cooper: That's all.

Redirect Examination

By Mr. Resner:

Q. Mr. Bailey, was that plane left on the Shawnee Trail or did you take it back and put it on the service barge? A. No, it was left on there.

Q. After this plane dropped was there a delay in your work? A. No. We went right ahead.

Q. Well, did you hear that the man had been hurt? A. I heard later on; yes, sir.

Q. How much later?

A. Well, I heard it at lunch time. A few minutes. Probably just before lunch I heard it.

Q. Well now, was there any period of time that

(Deposition of Cecil Bailey.)

elapsed between [50] the time the plane dropped and the time that you were told to carry on and move the gear around off the vessel and pick up the next plane?

A. No, I am not sure. I believe the only operation we got was to pick the plane up and after the man was hurt, I believe, and then we landed the plane, and then I think we went to eat later on. I don't think we done anything before noon. I am not sure.

Q. Did you actually lower the boom just before the plane dropped? A. No, sir.

Q. Were you trying to lower the boom?

A. I was going to lower the boom just before my hand caught this lever and released it.

Q. Did you lower the boom after?

A. No, sir. I didn't touch the boom at all.

Q. Although you had intended to lower the boom, you didn't do it?

A. No. I think they put the plane right there where it was. I am not sure.

Q. Had Cates given you the signal to lower the boom?

A. After that, I'm not sure whether we put the—Yes, we picked the plane up after the plane had dropped, and I'm not sure whether he swung me over or drifted the load or not after that on that particular lift.

Q. What is the signal for lowering the boom?

A. Four whistles.

Q. And that is the same for lowering the load?

(Deposition of Cecil Bailey.)

A. No, it isn't the same for lowering the [51] load.

Q. What is the signal for lowering the load?

A. It is two whistles for lowering the load.

Q. What is the whistle to stop?

A. One to stop.

Q. What is the whistle to pick up?

A. One to pick up. When he is lowering the load—We have signals between ourselves. When he is lowering the load or lowering the boom, a lot of times when the boom is lowering down he will give me a whistle, if he is looking at me, to raise the load a little. In other words, to try to keep it at the same level and boom down.

Q. He will give you a hand signal for that?

A. Or he will give me a whistle.

Q. One whistle?

A. Yes. To pick it up, if he is watching me.

Q. And what is the hand signal for picking up?

A. Up this way (indicating).

Q. You pulled your hand up with your index finger extended. Is that it? A. Yes.

Q. Is there a hand signal to "hold everything"?

A. Like this (indicating), yes.

Q. And you are leveling your hand off and shaking it from one direction to the other?

A. Yes.

Q. Is there a hand signal to pick up? The one you have given us. Is there a hand signal to drop the load? A. This way (indicating).

Q. With your index finger pointing down?

(Deposition of Cecil Bailey.)

A. Yes. [52]

Q. I see. And then it was when you went over to the side of the cab to put your left hand or arm on the cab window to look out, that your sleeve caught on this auxiliary lever and dropped the plane? A. Yes, sir.

Q. Did you actually get your hand or arm on the cab window?

A. Well, I guess when I pulled my lever I got it all the way and then I pulled the friction back.

Q. But you did get your hand and arm all the way on the cab window? A. Yes.

Mr. Cooper: I am going to object to that, counsel. This subject has been pretty thoroughly covered. And I want to object to counsel using leading questions to the point of telling the witness what the situation was, particularly at this stage of the game.

Q. (By Mr. Resner): Did you put your hand and arm exactly on the cab of the window?

A. Not my arm, no. I went to reach my hand on the window sill, and by doing that I tripped the friction clutch, by doing that, with the coverall of my sleeve which was hanging there.

Q. Did your hand get on the window sill?

A. I am not sure whether it did or not.

Mr. Ferguson: I will object to further questioning along this line of testimony. It is improper redirect.

Q. (By Mr. Resner): Mr. Bailey, after this accident happened did you give the Army officials any written statement concerning it? [53]

(Deposition of Cecil Bailey.)

Mr. Ferguson: I object to that upon the ground it is improper redirect.

Mr. Resner: You can answer.

Mr. Ferguson: It is improper redirect.

A. Well, I don't care to answer it if counsel says not.

Q. (By Mr. Resner): What is that, Mr. Bailey?

Mr. Ferguson: You can answer the question. Go ahead and answer it.

A. Yes, I give the Army a statement. Yes, sir.

Q. (By Mr. Resner): How many?

A. Just the one statement.

Q. Did you give anybody else besides the Army a statement? A. The FBI.

Q. Anybody else?

A. That's all. And the statement I gave them is actually the statement I am giving you.

Mr. Black: Were they written statements?

Q. (By Mr. Resner): That is, did you sign them? Were they reduced to writing or typing, and did you sign them?

A. They were all typed.

Q. And did you put your name on them?

A. I'm sure. Yes, I did, I believe.

Q. The actual drop of the plane was caused by your sleeve catching in this auxiliary lever?

Mr. Cooper: Well, I object to that.

Mr. Harrison: I object to that.

A. I am not sure, sir.

Q. (By Mr. Resner): I beg your pardon, [54] sir?

(Deposition of Cecil Bailey.)

Mr. Ferguson: Just a minute. We want the objections before the answer goes in, Mr. Resner.

Mr. Resner: Go ahead, Mr. Ferguson.

Mr. Ferguson: The objection is being made by Mr. Cooper, and he ought to be afforded the opportunity to make his objection.

Mr. Resner: He made his objection.

Mr. Cooper: No.

Mr. Resner: Didn't you conclude your objection?

Mr. Cooper: I object upon the ground that this question has been covered on direct by you and that the record, I believe, is clear at this point as to what actually took place, and this calls for a conclusion——

Mr. Resner: And what is your answer?

Mr. Cooper: ——whether it caused it or didn't cause it.

Mr. Ferguson: And I join in making the same objection, and it has been gone over. And if you insist upon repeating questions, I will suggest to the witness that he should not answer. And he is an employee of the United States government and the United States Attorney, being here, represents all employees of the United States government.

Mr. Resner: So you are representing Mr. Bailey on this deposition?

Mr. Ferguson: Certainly. Certainly.

Mr. Resner: As long as he is acting at your behest, Mr. Ferguson—— [55]

Mr. Harrison: We did not call him as a witness.

(Deposition of Cecil Bailey.)

Mr. Resner: It doesn't change the fact.

Mr. Ferguson: You have gone over it thoroughly.

Mr. Resner: It doesn't change the fact. We are not children and none of us was born yesterday. We all know what is going on here, Keith.

I haven't anything further.

Mr. Harrison: I have one further question.

Recross-Examination

By Mr. Harrison:

Q. Mr. Bailey, at the time of this accident was there any mechanical failure of the derrick?

A. No, sir.

Q. Was there any defect in the mechanics of the derrick barge, to your knowledge?

A. Not to my knowledge.

Mr. Cooper: I will object to that because the proper foundation has not been laid and it calls for the conclusion of the witness.

Mr. Ferguson: He asked for his knowledge.

Mr. Harrison: I asked for his knowledge. I don't think the objection is good.

Mr. Ferguson: Is that all?

Mr. Resner: About the signing of the deposition. Where can you read and sign it?

The Witness: Can we get a copy of those things?

Mr. Resner: Your lawyer will have a copy. [56]

The Witness: We have a lot of material over there, war material that we are loading, and we are supposed to be back as quick as possible.

(Deposition of Cecil Bailey.)

Mr. Resner: You can't sign it today.

Do you want to waive the signature, Mr. Ferguson?

Mr. Ferguson: We will waive it.

Mr. Resner: Will you waive it, John?

Mr. Black: Yes.

Mr. Resner: Will you, "Coop"?

Mr. Cooper: Yes.

Mr. Resner: The signature is waived. You can type it up and file it, Mr. Conklin.

(Signature waived.) [57]

Tuesday, March 18, 1952—2 o'Clock P.M.

The Court: Proceed.

(Reading of the deposition of Cecil Bailey was completed by respective counsel.)

Mr. Harrison: I believe that is all of the deposition, your Honor, except we waived signature.

Mr. Resner: Your Honor, on behalf of the libelant, we subpoenaed two or three longshoremen. I believe they are in the Court now. We are not going to call them as witnesses because the facts are very well established and will be by Mr. Luehr's testimony, and in our judgment it would only be cumulative. However, the witnesses are here, and while I want to excuse them and will ask your Honor to have them excused, Mr. Harrision might want to call them, and if he does we have no objection.

Mr. Harrison: I have subpoenas for three witnesses. Can you tell me who these are?

Mr. Resner: I don't know who they are. I wonder if the longshoremen, if there are any in Court, will stand up? Will you tell us your names, gentlemen?

A Voice: Withers.

A Voice: Bennie Johnson.

A Voice: Padula.

Mr. Resner: Do you want to call any of them, Mr. [132] Harrison?

Mr. Harrison: May I take a look for a moment? I think I would like to call Mr. Johnson.

Mr. Resner: This is a little bit out of order, but I thought to expedite the matter and save the witnesses from coming back, it might be proper.

Mr. Harrison: I would like to call Mr. Bennie Johnson, if I may.

Mr. Resner: This is understood it is out of order, but is on Mr. Harrison's case, is that all right?

Mr. Harrison: I think it will be very brief, your Honor. I want to bring out one point that I think will contradict something Mr. Spirz has said.

Mr. Resner: But it is on your case?

Mr. Harrison: It is on my case, yes.

BENNIE JOHNSON

called as a witness for the Government, sworn.

The Court: What is your full name, sir?

A. Bennie Johnson.

The Court: Where do you live?

(Testimony of Bennie Johnson.)

A. 323 Haight Street.

The Court: What is your business or occupation? A. A longshoreman.

The Court: How long have you been so engaged? [133]

A. I have been working on the front ever since 1944.

Direct Examination

By Mr. Harrison:

Q. Were you employed aboard the USNS Shawnee Trail on June 28th, 1950? A. I was.

Q. And you have been here in Court? Do you recall the accident we have been discussing?

A. Yes, I was.

Q. The injury to Mr. Frank Luehr?

A. I was.

Q. Can you tell us where your station was at the time the plane dropped?

A. My station was, I was down on the lower deck when this happened, and I had stepped off the deck into the ship to get some water, and just by the time I got back, that is the time when this plane fell; and when I heard the noise I looked up and I just did run trying to get out of the way, because it scared me and I ran to get out of the way.

When I turned around and looked again, I saw this gentleman here was laying on the lower deck, then I turned around and walked to him to find out what had happened.

(Testimony of Bennie Johnson.)

Mr. Resner: He was pointing to Mr. Luehr.

Q. (By Mr. Harrison): Can you tell us whether or not there were any other men up on the mechano deck?

A. Well, there was some up there, but I don't know just [134] how many was up there at the present time.

Q. But there were some men there?

A. There were some of them up there.

Q. Can you remember where they were stationed on the mechano deck?

A. Not at the present time.

Q. You can't recall? A. No.

Q. Do you remember seeing Mr. Luehr, where he was?

A. Mr. Luehr, I don't know just where he was standing, but from where he fell he must have been standing to the inshore side.

Q. To the inshore side? A. That's right.

Q. Is it possible to tell whether he was standing in front of the plane—in front of the wing or behind the wing?

A. Well, when he fell, I don't know where he was standing, whether he was standing in the front or either in the back. When I saw him he was down on the lower deck.

Q. But you are sure there were other men on the mechano deck? A. That's right.

Q. At the time the plane fell?

A. That's right. [135]

Mr. Harrison: I think that is all.

(Testimony of Bennie Johnson.)

Thank you, Mr. Johnson.

Mr. Resner: I have no questions.

Mr. Kay: I just have a question.

Cross-Examination

By Mr. Kay:

Q. Mr. Johnson, did you work on some other job where they were loading planes on mechano decks? A. No, that is the onliest one.

Q. Wasn't there one other job where you were on the mechano deck?

A. Not to my knowledge. I think that is the onliest ship I worked on loading planes.

Mr. Kay: Thank you.

Mr. Harrison: Thank you. That is all.

(Witness excused.)

Mr. Harrison: If your Honor would bear with me a moment, I would like to see if I want to call Mr. Padula.

The Court: Very well.

Mr. Harrison: Yes, I would like to call Mr. Padula, if I may. [136]

FRANK PADULO

called as a witness on behalf of the Government, sworn.

The Court: What is your full name?

The Witness: Frank Padulo.

The Court: Where do you live?

The Witness: San Francisco.

(Testimony of Frank Padulo.)

The Court: What is it?

The Witness: San Francisco.

The Court: Where?

The Witness: In the city.

The Court: Redwood City?

The Witness: No, city, in San Francisco.

The Court: What is your address?

The Witness: 284 Arleta Avenue.

The Court: What is your business or occupation?

The Witness: I have been working on the waterfront for many years.

The Court: How many years?

The Witness: About 20, 25, 30, I don't even remember myself.

The Court: I see. All right.

Direct Examination

By Mr. Harrison:

Q. Mr. Padulo, is that the way you pronounce it? [137] A. Padulo.

Q. Yes. Were you employed aboard the Shawnee Trail on June 28, 1950?

A. Yes, I was with the rest of the boys.

Q. On the day of this accident?

A. Yes, this accident.

Q. And you have been here in court and heard us discussing this accident?

A. Yes, I heard most of it, I got in the wrong room, I was listening downstairs, to something.

Q. I see.

(Testimony of Frank Padulo.)

Mr. Resner: He was directed to come to the wrong court.

The Witness: I got the wrong court, I got the wrong court, supposed to come up here and I was down below.

Mr. Resner: Apparently he was directed to Judge Goodman.

The Witness: 256 and supposed to be 338. I was down there listening.

Q. (By Mr. Harrison): Don't look at me, Mr. Padulo.

The Court: Make as many mistakes here as they do down on the waterfront.

The Witness: The way it looks, I was at the other one, and instead it should be here.

The Court: Don't let that bother you.

Q. (By Mr. Harrison): Do you recall the dropping of the airplane? [138]

A. Well, I was only there to steady the airplane.

Q. At the time the airplane dropped, what were you doing?

A. I was steadying on one of the ropes.

Q. The tag line? A. Yes, tag line.

Q. Where were you standing?

A. Right up, right do you call it, the mechano deck, whatever it is.

Q. Below the mechano deck? A. Yes.

Q. On the main deck?

A. Steadying the rope.

Q. You were on the main deck of the vessel steadying the rope? A. Yes.

(Testimony of Frank Padulo.)

Q. Attached to the airplane?

A. Attached to the wings.

Q. One of the wings of the airplane. How long had you been holding that rope?

A. Well, before they got—it was a little windy, steadying it for a few minutes anyway, I don't know exactly. Of course, nobody knows what was going to happen.

Q. Were there any other men on the mechano deck of the vessel?

A. A few, I didn't—we don't pay much attention. [139]

Q. Were there any men holding on to tag lines?

A. I guess, I got one of the lines, I don't know who got the rest.

Q. There were other men——

A. Everybody was trying to do his best to land the airplane.

Q. I see. Now, from your position on the main deck of the vessel could you see onto the mechano deck?

A. I was watching the airplane, steadying, which way the wind was whirling around.

Q. It was swinging?

A. A little, don't take much, a little breeze.

Q. A little breeze would swing it? A. Yes.

Q. Did you see any men up on the mechano deck?

A. Yes, I see the gentleman that got hurt.

Q. And how many were there? Were there any others?

(Testimony of Frank Padulo.)

A. Well, there was some, I think there was up in the—let me see, what you call it, facing right inside coming from the barge, and they set the blocks on the wheels, whatever—supposed to be blocks, supposed to set those blocks.

Q. And there were other men then on the mechano deck?

A. There, you know, around, have to move it out.

Q. When the plane came down everybody moved away?

A. You had to, it was right there.

Q. Do you know what Mr. Luehr was doing up there? [140]

A. One of the blocks where he was, the wheel, taking the wheels off, and had it on the block, trying to set one of those blocks on the plane.

Q. Yes. He actually had a block?

A. Yes, he was waiting, you know, the plane, supposed to set on that block.

Q. And do you remember whether or not he was actually, had a block or whether he was also trying to stop the plane?

A. Couldn't stop, because the plane supposed to stop so far from where it was supposed to rest.

Q. From your position on the mechano deck could he have helped you any from stopping that plane from swinging?

A. He was setting a block, a bunch in there, you know, trying to steady the plane, that is what happened.

(Testimony of Frank Padulo.)

Q. The plane, did it still have some motion, was it still moving a little bit?

A. The wind, you know, got so many men steadying it, you know, all around it, then when that happened it come, you know, everybody moved out.

Q. Now, do you remember whether there was anybody else—they need three blocks, don't they?

A. Yes, three blocks.

Q. Anybody else up there putting blocks under?

A. I think one, he was on the other side, and the other boys was on the other, and everybody—— [141]

Q. Could you see——

A. Well, because when it dropped——

Q. You remember——

A. I got out from the beams, some of the beams was kind of loose.

Q. Do you know how high the plane was above the mechano deck just before it fell?

A. Well, it was up about four or five feet.

Q. Four or five feet?

A. Yes, fell three or four.

Q. Was the distance between the landing gear and the block, or is that the distance between the wing and the mechano deck?

A. Well, you got the mechanical deck——

Q. Just a moment, would you talk slower?

A. I am in a mess, wasn't coming over here, because I got this thing this morning——

The Court: Sit back in the chair. Now, talk slower so he can get it down..

(Testimony of Frank Padulo.)

Q. (By Mr. Harrison): Now, tell us how high—think about what I am asking you—how high the wing of the plane was from the mechano deck?

A. Well, I am not exactly sure, could be three or four feet up, I didn't go up and measure, because I was down below the mechano deck, must be ten feet high, I didn't measure anything.

Q. Was the landing gear of the plane almost on the block? [142] A. Yes, it was pretty close.

Q. It was pretty close?

A. He was setting the blocks under it.

Q. I see. Thank you, Mr. Padulo.

Cross-Examination

By Mr. Resner:

Q. Just a couple of questions. You know, there are lots of lawyers, we all have the right to ask you questions.

A. I didn't want to come in this mess.

Q. I don't think——

A. If you had notified me a couple of days, had to come this morning after I went to work.

Q. You don't have to worry about that, we know you have been working; relax.

Mr. Padulo, you saw Mr. Luehr, the man——

A. Yes, that is the same man. He fell off.

Q. Did you see the plane fall on him?

A. Well, I run away myself, otherwise it would have gone on me.

Q. You were on the main deck?

(Testimony of Frank Padulo.)

A. I was on the main deck, but the plane——

Q. Talk a little slower.

A. The plane didn't go down, just on top of the frame.

Q. It rested on top of the frame?

A. Yes. [143]

Q. But you were on the deck below under the frame? A. Under the frame.

Q. And the plane fell on the man, Mr. Luehr; the plane fell on Mr. Luehr who was on the frame?

A. Yes, that is right, the plane fell on him up under the plane.

Q. The plane fell right on him?

A. That is right.

Q. You say the plane fell how many feet?

A. Well, I didn't measure, two or three feet, because, you know——

Q. Would it have been as much as five or six, seven feet, too?

A. She comes down, that is all.

Q. Could the plane have fallen as much as five or six or more feet?

A. Well, I don't know, it was pretty close, because the plane—the plane was close to the blocks.

The Court: Didn't he say it could be five feet?

Mr. Resner: That is right, five or six feet.

Q. You didn't, you don't know whether it could be four or five feet? A. That is right.

Q. All right. You had a hold of the tag line?

A. Yes, I had one of them lines. [144]

Q. Steadying the plane?

(Testimony of Frank Padulo.)

A. Steadying the plane.

Q. Is that right? A. That is right.

Q. Mr. Luehr was up on the deck steadying the plane?

A. He was setting the blocks on the plane.

Q. Wasn't he also steadying the plane, holding it?

A. Well, the plane wasn't close to it, you know; I didn't measure it, how close to it, but it was pretty close.

Q. But the plane had stopped anyhow?

A. Yes, stopped, and then it went.

Q. The plane, and then it fell without any warning? A. That is right.

Q. Just like somebody cut the line?

A. That is right. Kind of bounced back.

Q. Bounced back and he bounced off onto the deck?

A. That is right. Probably if when the plane landed it was steady, he probably would have stayed there.

Q. But he was holding onto that plane, was he steadying it while getting ready to land it?

A. This block, and had to fix the block so the plane could rest.

Q. I understand he had to fix the block, but wasn't he also steadying the plane to land it?

A. Didn't need to, his business was to fix that block, [145] so, you know——

Q. To steady the block, but he also had to steady the plane?

(Testimony of Frank Padulo.)

A. He was only, I remember he was right there.

Q. You remember he was by the block?

A. That is right.

Q. I see. You were paying attention to your work? A. That is right.

Q. You weren't paying too much attention to what was going on above you?

A. Well, I could see him, because the wings was close to him, see. I take the tag line, and I was watching which way the wind was blowing, trying to steady, there was a bunch around.

Q. Other men around, but you were paying attention to your particular job?

A. Well, I was right on the side, you know.

Q. This side, you mean the inshore side?

A. What they call—well, I was behind the plane just a little.

Q. You were behind the plane?

A. In behind steadying one of the tag lines.

Q. You were close to the rail of the ship?

A. No, I was a little off.

Q. You were close to the bulkhead, the house?

A. Toward the barge. [146]

Q. You were toward the barge?

A. Yes, close to the plane.

Q. You were close to the catwalk?

A. Well, in other words——

Q. Look there is a little model, Mr. Padulo. Will you come down here?

A. That is very similar.

Q. Walk down here, Mr. Padulo.

(Testimony of Frank Padulo.)

The Court: Go over there, there's a ship over there.

The Witness: There is a ship over there; all right.

Q. (By Mr. Resner): Of course, Mr. Padulo, this is the catwalk. All right. This, the bulkhead of the midship house, that way is the forward part of the ship? A. Yes.

Q. Over there is to the dock, that is the dockside. A. Yes.

Q. The dockside was to the—this side of the ship, the port side was to the dock, the plane coming from over where you and I are standing.

A. That is right.

Q. Coming over the ship being landed on this section here, and Mr. Luehr was over here on one of these beams out here by the rail.

A. That is right.

Q. All right. How close to the rail, where were you?

A. I was right in here (indicating). [147]

Q. Underneath? A. Underneath.

Q. On the deck? A. That is right.

Q. All right. You would be on the port side—you would be on the port side maybe about two-thirds of the way from the catwalk to the inshore rail?

Mr Cooper: Let him mark the place.

Q. (By Mr. Resner): Mark the place where you were.

A. I couldn't mark——

(Testimony of Frank Padulo.)

Q. Well, approximately.

A. (Witness indicating.)

Q. All right. A. Over here.

Q. I will put a circle there, I will put a "P" in the middle of it. Now, we have got it. Anyway that is where you were holding onto *to* the tag lines?

A. Steadying so the wind wouldn't get hold of it.

Q. Steadying it.

Mr. Resner: All right, Mr. Padulo, that is all.

The Witness: Is that clear enough?

Mr. Resner: Yes, sir.

Mr. Kay: I have just one question.

The Court: All right, go ahead. [148]

Cross-Examination

By Mr. Kay:

Q. Mr. Padulo, at this time that this plane fell down you were busy watching your work and you were looking at a lot of things around there, you didn't keep your eye on Mr. Luehr all the time, is that correct?

A. Well, I was—this is the airplane, and I hold this line under that, watch the airplane, this is right under here.

Q. I understand. You had a number of things to watch at that time, is that right?

A. Well, I was steadying the plane like the rest of them.

Q. Pardon?

The Court: Watching the plane just like the rest of them.

(Testimony of Frank Padulo.)

Q. (By Mr. Kay): Watching the plane?

A. So the wind don't take it away.

Q. So the wind doesn't take it away, and you watched your line, is that correct?

A. That is right.

Q. And waiting for a signal, is that right?

A. Not a signal, just steadying.

Q. Just holding the line? A. That is all.

Q. I see. That is all.

Mr. Cooper: No questions.

Mr. Harrison: Thank you a lot. I believe that is all. Mr. Withers is pretty much in the same boat. From his statement [149] it is merely accumulative.

The Court: Very well.

Mr. Resner: If your Honor please, I would like to ask Mr. Harrison for a stipulation that subject to any later corrections which may be made that the medical expenses which have been incurred on behalf of Mr. Luehr and paid by the Compensation Insurance Carrier, the Firemen's Fund, totals $7,322.32, and that the Workmen's Compensation that they have paid to Mr. Luehr since the accident happened to date totals $3,082.20.

Now, if we can get a stipulation to the figures they may be received subject to correction, that will be acceptable. I am not asking Mr. Harrison to stipulate about the legal problem here, because that is something that we will have to present and argue to your Honor at the appropriate time.

Mr. Harrison: I suggest, your Honor, Mr. Resner ask the real parties in interest that they paid

this amount, if they wish to stipulate to the amount.

Mr. Resner: They have furnished it to me and they advised me that they are correct.

Mr. Kay: Yes, I had two tapes run, I gave Mr. Resner one and one to Mr. Harrison, which are taken from the actual individual payments of compensation and the medical expenses, including hospital, X-rays and so on, so that each have exactly the same tabulation. Now—— [150]

The Court: Subject to any correction you wish.

Mr. Harrison: But the Government has no legal interest in the payments that have been made by hospitalization or through compensation.

The Court: All right, state for the purpose of the record the purpose of the offer.

Mr. Resner: All right, Judge, I will tell you in a minute. Under the Longshore and Harbor Workers Compensation Act, Title 33 of the U. S. Code, Section 33, a longshoreman, like Mr. Luehr, who has been injured, has the right either to compensation or to a damage action, but not to both. And if he maintains a damage action as he has here, he is obligated under the law to repay the compensation company what they have advanced for his welfare and benefit. They have paid him more than $3,000 in compensation and $7,000 in medical, more than $10,000 over the past 20 months. Without that money, your Honor, and without that care he would not have been able to have had any medical attention, nor would he have any money to live on, but at the same time, Judge, he has a clear right to maintain this damage action against the United States for their negligence.

Now, any award that he did get the compensation people would be entitled to get back and claim their money. That being the case, that being the case Mr. Luehr has to present that as an item of damage to your Honor to be added to any [151] award that he gets, because that goes back to the compensation carrier through him.

Now, the legal problem is this: Mr. Harrison here contends that the government——

Mr. Harrison: Mr. Resner, I will explain our position.

Mr. Resner: I want to say this to explain my position. I understand your position, if I am wrong about it, you correct me, but I understand that in the contract that the government has with Jones Stevedoring Company there is a provision against subrogation. That means that if Jones or the carrier, Firemen's Fund, pay out some funds for an injured worker, the Government says you can't come back against us, the Government, and collect it.

Now, that may very well be the agreement between the Government and Jones and Firemen's Fund, Judge, but that has nothing to do with the duties that exist between my client, Mr. Luehr and his employer and insurance carrier, because he has agreed to reimburse this $10,000. It is the only way that he could go ahead with his litigation, because obviously he was in no condition to go ahead and file this suit and have his compensation cut off and his medical attention stopped, and the Firemen's Fund and the Jones people very kindly agreed to continue to pay it while the litigation progressed,

and Mr. Luehr agreed to pay it back. That is a perfectly legal, binding agreement and arrangement.

Now, Mr. Luehr is bound, even though there may be other agreements between the Firemen's Fund and the Government, we are not concerned with that, but since Mr. Luehr has to pay this back, we are entitled to prove it as an element of damage. And I say under Section 33 of the Longshoremen's Act that is so provided, your Honor, and I will be glad to submit the authorities.

The Court: I will hear from Mr. Harrison.

Mr. Harrison: Your Honor, this is not the ordinary case, as pointed out in my opening statement, wherein the employer compensation carrier has maintained his lien or his right to recover back from the libelant in this particular case for this very reason: In the contract of insurance the compensation insurance which was taken out by Jones, they have waived any right to subrogation against the United States. Had Mr. Luehr accepted this money without filing this damage suit against the United States, the Jones Stevedoring Company has waived their right to sue the United States under any subrogation rights which they may feel that they have obtained by payment of this money.

Now, what Mr. Resner has suggested is that Jones be allowed to recover back this money indirectly against the United States by having Mr.. Luehr recover it for their benefit. Do I make myself clear?

The Court: Yes. [153]

Mr. Harrison: Now, it is our contention that these items of damages, the hospital bills and the

compensation already paid, are not proper items of damage in any judgment against the United States, because I don't care whether Mr. Luehr has made some separate contract with Jones Stevedoring Company, but if they are included in damages against the United States, then it amounts to nothing but an violation of the anti-subrogation agreement, because those payments will be made for the benefit of the compensation carrier. It is merely allowing Jones Stevedoring Company to, in effect, assign their supposed claim to Mr. Luehr and have Mr. Luehr come in and collect it from the United States in direct violation of their contractual agreement not to subrogate against the United States.

Consequently it is my feeling that any payments that are made by way of hospitalization and by way of compensation are not proper items to be considered in a case against the United States, not proper items of damages.

Now, as far as the amounts are concerned, perhaps we would get them in, certainly going to have to deduct those particular amounts from any judgment against the United States if there be one.

Mr. Resner: How could you deduct damages for hospitalzation if you say we are not entitled to it?

Mr. Harrison: Either deduct them or that he is not [154] entitled to them.

The Court: I think the best way, so both sides have a full opportunity to present it—I have never met it before——

Mr. Resner: Well, I haven't this precise prob-

lem, Judge, but I had the subrogation problem before.

Mr. Harrison: I haven't been able to find any cases on it.

The Court: So both sides will have a record I will allow it to go in subject to your motion to strike and over your objection. Is that all right?

Mr. Harrison: Yes, your Honor.

Mr. Resner: All right, Judge. The medical record total then will be the next exhibit for the libelant.

The Clerk: Libelant's Exhibit 16 admitted and filed in evidence.

(Thereupon the medical record total above referred to was received in evidence and marked Libelant's Exhibit No. 16.)

Mr. Resner: Let the record show that that total is $7,322.32 for medical expenses and hospitalization, doctor bills, and so forth.

And I would like to offer next the compensation payments.

The Clerk: Libelant's Exhibit 17 admitted and filed in evidence.

(Thereupon the compensation payments record above referred to was received in evidence and marked Libelant's Exhibit No. 17.) [155]

Mr. Resner: And that amount, for the record, your Honor, $3,082.20.

I only want to make this further observation, I will be brief. I am prepared to argue this now if

your Honor wants to hear further about it. It is my conception of the law under Section 33 of the Longshoreman's Act that this anti-subrogation agreement applies only a man receiving compensation has reduced his right to get compensation to an award before the Deputy Commissioner, before Mr. Pillsbury. Under those circumstances, when an award issues in favor of an injured worker, his right to sue the third party is automatically assigned to the insurance carier and the employer, and they then have the right to sue or not to sue for damages if they think there is negligence of a third party.

It is my conception of the law and of the situation here, your Honor, that the anti-subrogation contract that Mr. Harrison talks about applies only to the situation where an order or an award has been made and where the control of the litigation is in possession of the employer or his carrier. Obviously then, if they have the control of the litigation the Government can say, "Well, you have agreed with us not to sue us," and then that would be true, because they have contracted not to sue, having the right to sue, and they only have the right to sue under an award or order, but in this case there was no award or order. [156]

The injured man, Mr. Luehr, continued to receive his compensation. The compensation carrier could have cut off the compensation at any time, they could have stopped the medical at any time. That would have been an inhuman thing to do. They continued to pay the compensation and furnished

the medical. The consideration that Mr. Luehr then received was this continued compensation and medical and thereby he agreed to pay it back. If they had cut off compensation and medical your Honor, he would have had to go out in the market and buy his medical and medical which he got for seven thousand—it would have cost him fifteen or twenty thousand.

Now, under those circumstances he would have been entitled to collect it from the Government. Are they coming in here now saying that because he has mitigated his damages by this arrangement that that defeats the right to recover it?

I think your Honor will see the justice of the position and the legal merit of it.

Mr. Harrison: I have one sentence to say in that regard. Mr. Resner's interpretation of the law would lead to nothing but collusion between a claimant, a compensation carrier and to the detriment of the third party who may become liable. I will explain that in my final argument.

Mr. Resner: That is an outrageous statement. If an injured worker, who is at death's door is provided with medical attention and compensation, and he has got a clear [157] right to a third party because of negligence, that isn't collusion under any stretch of the imagination.

The Court: Any suggestion of collusion here?

Mr. Harrison: If your Honor please, I believe Mr. Resner and the attorneys for the Jones Stevedoring Company have made an arrangement between themselves entirely outside of the compensa-

tion law whereby Mr. Resner now feels that Mr. Luehr is going to become liable to pay back his compensation regardless of how the court holds, and I think that it was done for the sole purpose of making it possible for Mr. Luehr not to reduce his compensation to an award.

In other words, to maintain and keep alive his possible action against the Government, and it is certainly true that the compensation carrier for the Jones Stevedoring Company cooperated to that respect in that they made voluntary payments and didn't require the man to have a hearing or reduce his claim to an award.

Mr. Resner: I might say——

Mr. Kay: Your Honor please——

Mr. Resner: Let me finish, please. I might say this arrangement happens every day in a case where it is clearly the fault of a third party, as it is the fault of the United States in this case, and not even disputed, Judge. They can't defeat the man's rights in this way. He has got his right to have his compensation and his medical and if he is obligated [158] to pay back he pays it back, he can still proceed with his rights against the third party. The fact that the facts are laid out before the court showing clearly the fault of the United States is hardly justification for the statements made by counsel, they are just trying to avoid their legal liability in the situation.

Mr. Kay: Your Honor, I would like to hear Mr. Harrison's answer to your Honor's question as to whether or not, as he charges here, he is charging

that this might lead to collusion, carrier's collusion in this case. I am very much interested in the matter leading to collusion, his Honor just asked whether or not you are contending that there is collusion in this case.

The Court: I think he used the language there may be.

Mr. Harrison: Speaking of the interpretation of law as Mr. Resner suggested that it could lead——

Mr. Kay: You don't contend there was collusion in this case?

Mr. Harrison: I have expressed the facts which I believe existed, and I draw no opinion from them one way or the other.

Mr. Resner: Mr. Harrison is making sharp charges here.

Mr. Kay: That is a little different thing.

The Court: Well, whether he is right or wrong, he is in good faith, let us say, is he?

Mr. Resner: Well, the charge—— [159]

The Court: Just a moment. Whether he be right or wrong, he is acting in good faith.

Mr. Resner: I will say he is zealous, Judge.

Mr. Harrison: Perhaps I can ask a question. Was there not an agreement between you and Mr. Black or Mr. Kay whereby you agreed to pay back the compensation?

Mr. Kay: Yes, most assuredly. Nobody says there isn't.

Mr. Resner: We have agreed to in turn pay it back to them.

Mr. Harrison: Whether or not the law requires——

Mr. Resner: But the law requires——

Mr. Harrison: Whether or not——

Mr. Resner: We have agreed, since we received, we are obligated to pay them back, that is our obligation under the law.

The Court: The Government says, well, we are not a party to that agreement, that is between yourselves, but we have rights here and he is asserting that.

Mr. Resner: That is what he is trying to say.

Mr. Kay: That is correct, your Honor.

Mr. Harrison: That is right.

The Court: Let us proceed, gentlemen.

Mr. Resner: Mr. Magana will you take the stand and be Mr. Cates?

The Court: It is three o'clock, we will take a recess.

Mr. Resner: All right, Judge.

(Short recess.) [160]

Mr. Resner: We want to read a deposition of the witness Charles Cates, your Honor. This deposition was taken the same day that the previous deposition was taken. The same parties were present. Mr. Charles Cates, your Honor, was the whistle man or signal man who has been identified as being on the catwalk there with Mr. Spirz.

(Mr. Resner and Mr. Magana commenced reading the deposition of Charles Cates.)

Mr. Harrison: If your Honor please, once again there is no showing that Mr. Cates was going to be out of the jurisdiction. There is no showing that he is not available to us. His testimony is best received by his person. So far as I know of my own personal knowledge of it, he is still employed down at Fort Mason, and I checked, I think it was about ten days ago.

Mr. Resner: You agreed to take a deposition. I don't think there is any question but we have a right to use it.

The Court: Your other deposition, the facts and circumstances surrounding it justify it; but if this man is available here he will have to be produced.

Mr. Resner: If your Honor feels so, of course. I only want to offer this suggestion to the Court: I believe that under the Admiralty Law, which applies here, that there is no necessity to produce a witness on the ground that a showing must be made that he is absent from [161] the jurisdiction. I think where a deposition is taken it can be used.

Mr. Harrison: I disagree heartily.

The Court: Legally I don't think your other deposition could be challenged under the circumstances. It might here. Since he is available, produce him.

Mr. Resner: May I ask Mr. Harrison to produce him inasmuch as he is an army employee?

The Court: Yes, if he is available.

Mr. Harrison: Army employees are just as available by subpoena as Smith or Jones.

The Court: Will you assist in locating him?

Mr. Harrison: Yes.

The Court: You will be surprised at the help I get from everyone. All right.

Mr. Harrison: However, I do insist Mr. Resner subpoena him.

Mr. Resner: Let me ask you this: If we don't subpoena him, do you intend to call him?

Mr. Harrison: I do not.

Mr. Resner: All right. And you say he is at Fort Mason?

Mr. Harrison: I checked ten days ago and he was still employed in the employment he had at the time of his deposition. [162]

Mr. Resner: All right. We will call Mr. Luehr.

The Court: It doesn't necessarily follow, under the circumstances, he must be here today.

Mr. Resner: No, Judge. I was just going to check if he was there.

The Court: All right.

Mr. Resner: Mr. Luehr.

FRANK LUEHR

the libelant herein, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. Frank Luehr.

Direct Examination

By Mr. Resner:

Q. Speak up loudly, Mr. Luehr, and answer all the questions so that everyone in the Courtroom can hear you. Now, you live where, Mr. Luehr?

(Testimony of Frank Luehr.)

A. 2529 Grove Street, Oakland.

Q. When were you born?

A. March 11, 1899.

Q. At what place?

A. Caledonia, Minnesota.

Mr. Resner: I am going to omit many of the preliminary questions, your Honor, because Mr. Magana will ask them in relation to the question of damages and medical, and I am [163] going merely to certain phases of the examination. First I want to take up this question of earnings.

Q. (By Mr. Resner): In the year 1948 you were employed as a longshoreman, were you, Mr. Luehr? A. Yes, sir.

Q. And do you know what your earnings were that year? A. Not exactly.

Q. I have your income tax return here (handing document to the witness). I will show it to you. The total figure is listed right there.

A. That is right. $3,063.57.

Q. That was all through the Waterfront Employers' Association and through the Mutual Stevedoring Company? A. That is right.

Q. That was in the year 1948, is that right, Mr. Luehr? A. That is right.

Q. Was that the year that there was a strike which lasted 101 days—105 days A. Yes, sir.

Q. So you didn't work those 105 days?

A. Well, I did a few days, probably a day a week or something like that, they alternated them. for the army and the navy.

(Testimony of Frank Luehr.)

Q. All right. During the year 1948 did you take all the work that was available to you? [164]

A. Oh, yes, sir.

Q. You didn't lay off because of illness or injury or anything of that kind? A. No, sir.

Mr. Resner: Now, if your Honor please, and Mr. Harrison, so that we will have this for the record, Mr. Paul brought in—did he hand you the sheets he brought in today?

Mr. Harrison: Yes, he did.

Mr. Resner: The originals you have there, I take it. All right, I will offer these. I will offer as libelant's next in order the port hours for the port year 1948, your Honor.

The Court: Identify the document for the purpose of the record.

Mr. Resner: It is a compilation prepared by Mr. L. R. Paul, the gentleman who was here yesterday, chief clerk of the Longshoremen's Labor Relations Committee, and it shows the port hours worked during the periods 173 through 210. It indicates the port hours during the period, 1,670, at the wage rates of $1.67 for the straight time hour and $2.50½ for the overtime hour. May it be received, your Honor?

The Court: Let it be admitted and marked.

(Compilation of port hours for the port year 1948 was [165] admitted into evidence as libelant's Exhibit 18.)

Mr. Resner: And so we have the record before

(Testimony of Frank Luehr.)

us here, your Honor, I have made a compilation, if a man worked the port hours in 1948 he would have worked 1,670 hours. That multiplied by the straight time rate of $1.67 would give a man for that year $2,788.90. Mr. Luehr earned $3,063.57, or approximately $300 more than the port hours.

If you carry the total out for the 105 days the men were on strike, that would have approximated an additional $1,000; so if the port year had been normal, that is, without the strike, the average earnings for that year would have amounted to approximately $4,000.

Now, that of course is a matter of argument, but I wanted the record to show that for the appropriate time when we come to it.

Q. (By Mr. Resner): Now, during the year 1949, Mr. Luehr, do you know what you earned?

A. Well, it seems to me it was around $4,400. I don't remember.

Q. Well, I have the record here, Mr. Luehr, for 1949 at $4,252.07.

A. Well, it could be that.

Q. Or could be a little more?

A. I wouldn't say exactly because I don't remember.

Mr. Resner: Well, someone—I don't know how they [166] did it—the United States Attorney got Mr. Luehr's income tax returns. Mr. Harrison, what does the income tax return show for the year 1949?

(Testimony of Frank Luehr.)

Mr. Harrison: I don't have the income tax return.

Mr. Resner: You checked it, didn't you? Didn't you get the information from it?

Mr. Harrison: I have the information. I don't know that it is from the income tax return.

Mr. Resner: How much do you show?

Mr. Harrison: For 1949?

Mr. Resner: Yes.

Mr. Harrison: $4,252.07.

Mr. Resner: That is what I have got.

Q. (By Mr. Resner): During that year, Mr. Luehr, you worked some time in Alaska, did you?

A. Yes, sir.

Q. In what capacity? A. Longshore.

Q. What month did you work in Alaska?

A. I went up there in June, July, August, September, and probably about half of October.

Q. So you worked in Alaska for four and one-half months? A. About that.

Q. Do you know what you earned in Alaska during that four and one-half months as a longshoreman? [167]

A. No, I can't say offhand.

Q. Approximately?

A. But I would say 25—maybe $2,500.

Q. All right. In any event, the income tax return for the year shows $4,252.07?

Mr. Resner: Now, if your Honor please, I want to offer in evidence—Mr. Harrison has called for it—the port hours of San Francisco for the period

(Testimony of Frank Luehr.)

1949, periods 186 to 198; and it was prepared by Mr. L. R. Paul, the gentleman who was here yesterday; showing for this period the port hours were 1,655 hours at a wage rate of $1.82 straight and $2.73 overtime. I will offer this compilation as libelant's next exhibit.

The Court: It may be admitted and marked.

(Compilation for 1949 was admitted into evidence as libelant's Exhibit No. 19.)

Mr. Resner: For the record, your Honor, I might say that I have run the totals out of 1,655 hours at $1.82. If a person had worked the available port hours at this port in San Francisco, he would have received earnings of $3,012.10. I have given the $4,252.07 that Mr. Luehr earned, both at this port and in Alaska.

Q. (By Mr. Resner): Now, for the year 1950, Mr. Luehr—that was the year you were hurt?

A. That is right. [168]

Q. Do you know what you earned between January 1st and July 28th, 1950?

A. In the neighborhood of $1,500, I think.

Q. I show you a copy of your income tax return for that year, Mr. Luehr, and indicate to you, and ask you what that is? A. That is it.

Q. And that return shows you earned for that period $1,548.78? A. That is correct.

Q. Did you work the time that was available to you during 1950 until you were hurt?

A. Yes, sir.

(Testimony of Frank Luehr.)

Mr. Resner: Now, if your Honor please, the exhibit which we have in evidence here, No. 15—libelant's Exhibit 15, the port hours during the year 1950—that is the year that he was hurt—of course he didn't work all that year after he was hurt. The port hours total 1,900 hours. 1,420 of those hours were worked at the rate of $1.82, then the rate changed on September 30, 1950, and the rate became $1.92, totalling a ten cent raise per hour. So 480 hours of that period at $1.92, and 1,420 hours at $1.82 would amount to $2,584.40.

480 hours at $1.92 would amount to $921.60. Or if a man worked the available port hours in the year 1950 at the [169] two different rates of pay, he would have earned $3,506.00. Mr. Luehr earned $1,548.78, as his income tax return shows.

The record further shows, your Honor, that starting with December 26th, 1950, or approximately January 1st, 1950, the year he was hurt, down to July 30th, 1950, two days after he was hurt, 950 hours were available at the port. That would have meant if a man worked all the available port hours in that time he could have earned $1,729. So the man could have earned, if he worked all the port hours, approximately $175 more than Mr. Luehr earned in that period.

But in the remainder of the port year—less the half a year—let's see, in four and one-half months there were 950 hours, your Honor, and 450 of those were at $1.82 and 500 at $1.92. That totals $1,779. That means in the period 1950, after Mr. Luehr

(Testimony of Frank Luehr.)

was hurt, a man working the available port hours would have earned $1,779. The total a man could have earned for that year, as I said, would have been $3,506.

I might say, your Honor, I have run out the computations on Exhibit 15, and they show that for the year 1951, last year, your Honor——

Mr. Harrison: Well, if the Court please, this has run on long enough. It is all argumentative and should be reserved until the end of the trial. We are here to hear what Mr. Luehr has to say. I think all this is argumentative. [170]

Mr. Resner: It isn't anything of the kind. I am showing just the totals. I am doing that to get it in orderly fashion, and the earnings in this period of 1951, if I may go over it, will complete the record.

The Court: Are you about to conclude?

Mr. Resner: Yes, I am.

The Court: Proceed.

Mr. Resner: In 1951 the port hours total 2,360; 1,120 hours were worked at the rate of $1.92, $2,-150.40; and 1,240 hours at $-1.97—the rate changed $2,442.80; so that if a man worked all the available port hours in 1951 he would have earned $4,593.20.

That takes us up for the years 1948, 1949, 1950, 1951.

Q. (By Mr. Resner): Now, Mr. Luehr, I direct your attention to July 28th, 1950, and ask you if you were involved in an accident on that day?

A. Yes, sir.

(Testimony of Frank Luehr.)

Q. What time of day did the accident happen?

A. I think it was around 11:30 in the morning.

Q. In the morning? Where were you working at the time of the accident?

A. I think they call it the Alameda Army Air Base.

Q. Were you on a ship at the time of the accident? A. Yes, sir. [171]

Q. What was the name of the ship?

A. Shawnee Trail.

Q. Who was your employer at the time?

A. Jones Stevedore Company.

Q. Were you working as a longshoreman?

A. Yes, sir.

Q. What kind of cargo was being loaded at the time you were hurt?

A. We were loading jet airplanes.

Q. Loading jet airplanes? At what particular part of the vessel were you located when the accident happened?

A. It was on the after end of the ship.

Q. On the after end of the ship?

A. On the port side, on the inshore side.

Q. That is on the aft forward of the house?

A. That is right.

Q. On the inshore side? A. Yes, sir.

Q. Do you know what you had done between the hours that you had turned to in the morning? By the way, when was that?

A. We went to work about eight o'clock in the morning.

(Testimony of Frank Luehr.)

Q. The accident happened at 11:30?

A. Yes.

Q. Those several hours do you recall what kind of work you [172] did?

A. Well, I think we loaded planes at the forward end of the ship.

Q. Forward or after?

A. At the forward end of the ship, then we moved aft to load.

Q. I see. To load this particular plane?

A. To load this particular plane.

Q. Now, Mr. Luehr, I want you to tell the judge just what you were doing and what you saw and what happened with regard to how this accident happened?

A. Well, the best I remember is that while this plane was being hoisted off the barge and it probably was around forty feet in the air—that is, off the deck, and it has to be that high to clear all the stays and other obstructions on the ship so it won't be damaged in any way.

As the plane was being taken over to the port side of the ship, it was lowered and maybe it stopped once or twice so that the plane, the wings, the fuselage not being damaged in any way. I was on the main deck, and after the plane was coming down I got up on the mechano deck. There is no way of getting up there but climbing up. There is no stairway. I was standing way out on the outer edge as the plane was coming down, and it stopped, I think, within about six feet of the mechano deck.

(Testimony of Frank Luehr.)

What I mean, six feet of the bottom of [173] the fuselage on the mechano deck.

Q. There were these struts on either side under the wings?

A. There is one on each side underneath the wing.

Q. All right.

A. I remember the whistle man giving the signal to stop the plane, and it did stop; and as it did I moved forward a few steps, maybe four or five, to get in the position that I was, so I could help steady the plane. There is no way of getting hold of the plane outside of probably the strut with one hand and the fuselage with the other.

Q. You are indicating your left hand?

A. I had hold of the strut with my left hand. The plane was, we will say, about so high (indicating)—that is, the strut—and the fuselage was probably about this far from my head (indicating).

Q. You are indicating about six or eight inches above your shoulder?

A. That is correct. And I remember having my right hand on the fuselage. Just where, I couldn't say.

Q. What were you standing on, Mr. Luehr?

A. Well, I was standing on this mechano deck. I don't know just exactly how wide they are. Seems to me they are about six or eight inches wide.

Q. Were you standing on one of these solid beams? A. Yes. [174]

Q. One of the solid beams?

(Testimony of Frank Luehr.)

A. Yes. I had my left foot forward.

Q. Toward the catwalk?

A. Toward the catwalk. There was a cross beam that run fore and aft between my right leg and my left leg.

Q. One of those moveable beams?

A. That is correct. You had to stand in that kind of position on the mechano deck to brace yourself. In holding that plane with your left hand on a strut and your right hand on the fuselage, evidently you will have to be pretty close to the plane or—probably the wing would probably be just about over your shoulder, or the fuselage. I don't remember just exactly.

But all of a sudden something gave way as though a line was cut. It dropped and it hit me on my left shoulder and threw me forward with a great crash. I landed head first down toward the deck.

Q. Do you know whether you fell altogether, or do you recall striking the beams and the plane falling on you and coming up and then falling again, Mr. Luehr?

A. No, I don't remember. I remember when it fell and I fell toward the deck head first, then it either bounced or the operator lifted it. That I don't know. But it gave way and I landed on the deck in a position of this kind, with my hands first, head down first. [175]

Q. You have indicated the plane fell on you pinning you to the mechano structure?

A. That is right.

(Testimony of Frank Luehr.)

Q. Moved up again a bit, and you fell off the mechano deck onto the solid deck beneath?

A. That is correct, yes.

Q. How long had the plane been standing there in the stationary position with your hand onto it before it fell?

A. It could not have been very long. Just approximately a few seconds, I would say.

Mr. Resner: All right. I am going to let Mr. Magana take the rest of the examination.

Direct Examination
(Continued)

By Mr. Magana:

Q. Mr. Luehr, I want to, just for a moment, go back a ways from the scene of the accident, and to ask you first of all, would you tell the Court just in a brief way about the type of work you did before you went stevedoring?

A. Well, coming from Minnesota, or being in Minnesota, I was on my father's farm there up until about 1926. I came to Los Angeles and done various work for maybe six months. I came up into the Sacramento Valley, and I worked up at Willows and around Willows doing tractor driving, warehouse work and harvest work.

In 1940, I believe it was, I was in the fire department [176] for about fifteen months. Then I came to work in the Bay Area for Moore Dry Dock Company in Oakland, until 1943 I went to work as a longshoreman, and have been up till date.

(Testimony of Frank Luehr.)

Q. Then prior to the time that you went to work as a longshoreman in 1943, your work had been manual labor completely, is that right?

A. All hard work.

Q. All right. Prior to the time that you suffered this acident, July 28th, 1950, had you previously injured any part of your body?

A. No, sir.

Q. Then after you suffered this accident do you remember being withdrawn from the ship to a hospital? A. Yes, I do.

Q. To what hospital were you taken?

A. Alameda Hospital.

Q. En route there did you have any pain about any portion of your body? A. Excuse me?

Q. En route, or going over to this Alameda Hospital, were you suffering any pain, or do you remember? A. Oh, yes, I had great pains.

Q. Whereabouts?

A. In my back, mostly, at that time.

Q. While you were there on the mechano deck did you notice [177] any portion of your body, whether it was different than before?

A. Well, as I—after I fell on the deck, just a few seconds, yes, I knew there was something wrong with my leg.

Q. Which leg?

A. My left leg. And I looked down and I saw my bones sticking through my pants leg.

Q. Whereabouts? Can you show the Court?

(Testimony of Frank Luehr.)

A. Approximately here (witness rolled up pants leg and indicated).

Q. You are indicating just below the knee, is that right? A. Just below.

Q. All right. You have been in the hospital on several occasions since this accident, is that so?

A. That is correct.

Q. Now, without telling the Court as yet what they did for you in the hospital, will you give the Court an outline of the times you have been in the hospital since this accident? I believe there were five times altogether.

A. Well, I was taken to the hospital after the accident and I was there 100 days.

Q. That would take you about to November 5th of 1950?

A. That's right. I got out November 5, 1950. I went back in again in the first part of December, maybe the 5th [178] or 6th, and I had another operation on my leg, and I was released about ten days later.

Q. That would be about the 16th of December?

A. The 16th, I think it was, when I got out. Then on about February some time, I don't remember the exact date, I went to the Merritt Hospital in Oakland and had a cast, a new cast put on.

Q. The left leg? A. On my left leg.

Q. All right.

A. And I was there only, well, the one day and out the next. Then on March 11th of last year I went to the hospital again, the Merritt Hospital, and

(Testimony of Frank Luehr.)

on the 12th the doctor operated on me on this side and undermined all this skin (indicating).

Q. Yes, we will come to that in just a moment, but how long were you in the hospital this fourth time? You went in March 11th. When did you get out?

A. Well, that was, I think, about 45 days.

Q. That is about April 17th, is that right?

A. Approximately, yes.

Q. When were you in for the final time, in the hospital? I think the record will show in August 16th? A. I think it was in August.

Q. How long were you there that time? [179]

A. About ten or twelve days.

Q. Since that time have you not been in the hospital? A. No, sir.

Q. The first time, then, when you were in the Alameda Hospital, when you were there approximately 100 days, will you tell the Court approximately when it was that you were aware of any pain or suffering about any portion of your body?

A. Well, the first few days, I might say a week, there wasn't much pain of any kind because they had me so doped up that I didn't know what I was doing, if I was coming or going. But as time went on I had a great big lump, almost the size of my fist, in the middle of my back; and that gave me great pain because I couldn't lie on my back, I couldn't lie on my side.

Q. Excuse me. Could you indicate—can you stand up without too much difficulty?

(Testimony of Frank Luehr.)

A. Yes (standing).

Q. Will you indicate to the Court where this lump was that you saw was in the middle of your back? Would you mind turning so that counsel can see?

The Court: I can see.

A. Right in there (indicating on back).

Q. (By Mr. Magana): You are indicating the middle of the back above the belt line, is that [180] right?

A. About two or three inches above the belt.

Q. All right, will you sit down? Continue and tell us about that 100 day period, just generally?

A. I have also a lot of pain lower, around by hips, coming toward the front, which gives me a great deal of trouble.

Q. Excuse me, Mr. Luehr. Did you notice that while you were in the hospital in that first 100 day period? A. No, I didn't.

Q. Well, that is what I want you to tell the Court about. During that 100 day period you have told us at some time you observed that lump in the back about the size of your fist.

A. That is correct.

Q. Did you observe anything else or notice anything else? A. No.

Q. Did you have any pain while you were in the hospital there?

A. Not a great deal. I was lying still most of the time.

Q. Then when you got out of the hospital after

(Testimony of Frank Luehr.)

the 100 days were up, how did you leave the hospital? A. Some friends brought me home.

Q. In a car? A. That is correct.

Q. Were you wearing a cast any place?

A. Oh, yes, I was in a cast.

Q. Where? [181]

A. My left leg, way up to my groin.

Q. Then when you got home, the next entry into the hospital was December 6th. What did you do from November 5th to December 6th of 1950?

A. Well, I was in bed the greater part of the time. I tried to sit up several times. I probably couldn't sit up more than two or three hours at a time in the day time.

Q. Well, in that time were you suffering pain about any portion of your body?

A. Yes, my back. My back gave me quite a bit of pain.

Q. Whereabouts?

A. This lower vertebrae here just above my beltline.

Q. All right. After you went in then and went back to the Alameda Hospital December 6th and remained there for ten days, what did they do for you there at that time?

A. Well, they operated on my leg. He cut out a lot of dead bone and infection.

Q. Whereabouts was that?

A. This is the incision right there (indicating), and he cut in here, around through here.

(Testimony of Frank Luehr.)

Q. You are indicating below the knee on the front side?

A. Below the knee, that's right.

Q. Were you put in a cast again?

A. Oh, yes.

Q. And then how did you get home on December 16th? [182] A. With some friends.

Q. Then from December 16th till you went back to the hospital on December 1st of 1951, were you wearing a cast?

A. That was just for a cast change.

Q. During that period of time, though, Mr. Luehr, were you wearing a cast?

A. Oh, yes.

Q. And was there any drainage from the wound there about your leg?

A. Oh, yes, it has been draining ever since.

Q. Were you suffering any pain during that period of time?

A. Not a great deal, because I couldn't bend my leg. My leg was perfectly straight.

Q. How about your back? How is that feeling?

A. My back pains me all the time.

Q. Stop for a moment at February 1st and tell us, you said the plane hit you on your left shoulder. As of February 1st, of 1950, were you having any pain or any discomfort about the left shoulder?

A. You mean before the accident?

Q. No, February—I am sorry, February 1st of 1951, were you suffering any pain about the left shoulder? A. Oh, no.

(Testimony of Frank Luehr.)

Q. Then coming into March 11th of 1951, your fourth entry [183] into the hospital when you remained for 45 days, just generally what did they do for you there at that time?

A. Well, I can probably show you better. He made an incision on this side (displaying leg). He undermined that skin on this side and then about a week later he made this incision and undermined all the skin on this side.

Q. Yes.

A. Then about a week, or I don't know how many days it was—maybe ten days—he cut a deep hole in here and took out dead bone and a lot of infection that was in the leg at that time. And he took—my doctor, that is——

Q. That is Dr. Walker?

A. Dr. Walker. Took skin off this leg and grafted skin on this side and on this side to push this together, because there was such a large opening here that it could never heal.

Q. All right. He took skin from your right thigh to put on the inside of the left calf, is that right? A. That is right. [184]

Q. Would you for a moment—may I ask for the privilege of showing it to the Court?

The Court: We have the doctor here?

Mr. Magana: Yes, we will, thank you, that is right.

Q. Thereafter when you got out of the hospital on April 17 did you have a cast on at all?

A. No, sir.

(Testimony of Frank Luehr.)

Q. How did you get out of the hospital? By that I mean did you walk out or were you ridden out?

A. No, they took me out in a wheelchair then up to the door, and then I walked on crutches from the chair to the car.

Q. Well, then, you got home some time around April 17th. What did you do from April 17 until August 16?

A. Well, I couldn't do much walking, because my—there was that bone had been undermined, the infection had been taken out, and it wasn't too strong.

Q. Well, was it still draining? A. Oh, yes.

Q. Were you able to bathe at home?

A. No, sir.

The Court: It is draining now?

The Witness: Pardon?

The Court: It is draining at the present time?

The Witness: Yes.

Mr. Magana: Now, on this draining matter, when did you [185] first notice that it began to drain?

A. I couldn't answer that, because I don't know. It has been quite some time ago.

Q. All right. Then finally this last admission from August 16 to August 28, what did they do for you then?

A. Then they operated on me again and took out my infection and more dead bone.

Q. And when you left the hospital that last time how did you leave it, walking or wheelchair or how?

A. Well, no, I think I was on crutches at that

(Testimony of Frank Luehr.)

time. They may have taken me out on the wheelchair so far as the door.

Q. At any rate, when August 28 of 1951 came around were you wearing a cast any place?

A. No, sir.

Q. Now, to this time, from the date that you were in the hospital the first time, until you were released from the Merritt Hospital on August 28 of 1951, do you still have the complaints about your low back?

A. Oh, yes, my back is awfully sore.

Q. Were you getting any treatment for it during that period of time?

A. I have had some physical therapy treatment.

Q. And what type, would you indicate, please?

A. You mean where? [186]

Q. No, what did they do for you?

A. Oh, they put an electric heat on there and then they rub it with oil, and that is about all there is to that.

Q. All right. From August the 28th of 1951 to this present time, March, the middle of March of 1952, have you been seeing the doctor?

A. Oh, yes.

Q. What treatment have you been getting?

A. I was treating my leg all the time.

Q. You're indicating the left leg?

A. My left leg, yes.

Q. Now, have you been getting any treatment for the back?

A. Well, my—as I say, the physical therapy has

(Testimony of Frank Luehr.)

been giving me treatments, but not the doctor hasn't.

Q. How often are you getting the treatments?

A. Well, every time I go to the doctor I have been going to the physical therapy, and then up until some time ago he left, didn't bother about by back, but she worked on my knee and ankle so I could get my leg under me.

Q. Which knee and which ankle?

A. On my left leg, my left knee.

Q. All right. Now, at the present time then and between August 28 of 1951 and the present time, have you been using crutches to get around?

A. Oh, yes. [187]

Q. And I notice that you don't have a crutch here in court today, but how long have you been using the cane instead of a crutch?

A. I worked—walked with the cane and a crutch for quite some time. I finally got rid of the crutch and walked with my cane alone.

Q. Since what time?

A. Oh, we will say three months, probably.

Q. And with reference to walking about how much walking are you doing, say, as of March 1?

A. Oh, I don't walk a great deal, maybe three blocks, four blocks at the most.

Q. Have you been doing that daily?

A. Oh, no, maybe once a week.

Q. All right. Well now, then, at the present time to bring us down to this date, can you tell us, do you have any present physical complaints at this time? A. Yes, my back is very, very sore.

(Testimony of Frank Luehr.)

Q. Well, if you will, so that we don't miss anything, will you start from the top and go down; do you have any complaints about the head at this time? A. No.

Q. Do you have any complaints about the left shoulder or this left collarbone?

A. No, sir. [188]

Q. How about your rib cage?

A. My ribs are all right.

Q. Have you any complaints about the ribs at this time? A. Not a bit.

Q. How about your breathing?

A. Well, I am short of breath if I walk any distance at all. I just noticed a while ago when I was out there, when I came back again I breathed awful heavy.

Q. Before the accident had you ever had any trouble with breathing in doing your stevedoring work? A. Oh, no.

Q. Continuing on down, how about your back, how is it at this time?

A. My back is still very, very sore.

Q. Whereabouts?

A. Whereabouts, did you say?

Q. Yes.

A. Well, about two or three inches above my belt line, I would say, and then it goes down to around my hips, around the sides; my hips are very sore. I have a great pain here on my left side, on my left hip. It also pains me underneath here to my knee (indicating).

(Testimony of Frank Luehr.)

Q. Indicating underneath the thigh and down into the knee. A. In my left leg.

The Court: Left leg. [189]

Q. (By Mr. Magana): Yes, it was on the left side. A. On my left side, that is right.

Q. Now, with reference to this pain about the back, I am referring to the one that is two inches above the belt line in the middle of the back, has that pain gotten any better or any worse than it was before?

A. No, it isn't any better. About, I don't know, ten days ago, twelve days ago, why I had quite a relapse one night after I went to bed. I had terrific pain and I couldn't, I tried to get up in a sitting position. I couldn't do that. I couldn't lie down, I asked my wife to give me a couple of Anacin tablets, which she did, and about an hour later I took a few more. They didn't seem to help me any, and I did not get no rest all that night.

Q. Since that time have you noticed any difference about the pain in your back?

A. Yes, my—it seems as though quite a bit of that pain has gone to my hip and——

Q. Which hip?

A. My left, my left hip.

Q. Well, now, in describing this pain, can you tell us what type it is? Is it a dull, a sharp one, an aching one, or what type?

A. Well, in my hip it has been a very sharp pain.

Q. No, I am referring now to the pain in the

(Testimony of Frank Luehr.)

back two inches [190] above the level of the belt.

A. That is always a very sharp pain.

Q. Does it go away at all? A. No.

Q. Then is it with you all of the time?

A. All the time.

Q. Have you noticed any improvement in that pain? A. No, sir.

Q. Well, other than the pain there do you notice any pain into any other portion of your body traveling, that appears to travel from the back and small of the back that you describe?

A. Well, as I said before, I have this pain around my side, in my hips.

Q. You're indicating with your hand around the side?

A. And what I mean, towards the front of me here.

Q. And about—pardon me.

A. Excuse me, but I cannot sit on anything hard; that is why I sit on this pillow.

Q. Now, with reference to that pain that you say goes down into the hip and into the back of the leg, let us take the one into the back of the leg first, the left leg to the knee, when did you first notice that, if you remember?

A. Well, since the last 10 or 12 days when I had the relapse, that is really hit my hip more than what it did before. [191]

Q. Now, how about the feeling in your leg below the level of the knee, how is that?

A. You mean down below here? (Indicating.)

(Testimony of Frank Luehr.)

Q. Yes. A. Below my knee.

Q. Yes.

A. Well on this side here it is a numb feeling.

Q. You are indicating——

A. It is a numb feeling.

Q. You are indicating the outside of the leg below the knee? A. That is right.

Q. How far down does it go?

A. I would say all the way from the knee to my ankle.

Q. For how long have you noticed that?

A. It always has been that way, that is, since the accident.

Q. How about the left ankle? How is that?

A. My left ankle is also very weak and very sore. I have not got the right movement in it, it hurts me when I walk.

Q. How about the right ankle?

A. That is also weak and it bothers me a great deal if I walk, we will say, three or four blocks, why, my right ankle is just as tired and sore as my left ankle.

Q. Now, you indicated something about the knee of the left leg, can you move your left leg in a backward motion such as I am indicating, as you can the right one? [192]

A. I think it is up to about 90 degrees, a trifle past 90 degrees.

Q. Have you noticed any improvement in that?

A. Yes, I think it has been getting a little better.

Q. And for how long has it been since you have

(Testimony of Frank Luehr.)

been able to move it to the position that you just indicated?

A. Oh, that's been getting better gradually for, I would say, maybe—at one time my leg was really stiff, I couldn't bend it at all, so with the physical therapy and the help of myself trying to bend it, why, it has been going on now maybe five or six months, I would say it has been getting better all the time.

Q. Now, I notice in sitting here that you appear to push on your left hand and to rest on your right elbow. Is there any reason why you do that?

A. I always sit that way, it takes the pressure off my back.

Q. Off of what portion of your back?

A. Well, say from here up, if I can keep my elbows—(indicating).

Q. You are indicating above the belt line on both sides up?

A. Up if I get the pressure off that injured place it doesn't hurt near as much as it does otherwise.

Q. Now, about walking. Previously you indicated that about once a week you might walk two or three blocks or so. Do you notice any difficulty in walking? [193]

A. Oh, yes, it is very hard for me to walk.

Q. Whereabouts, if any place, does it hurt you?

A. My ankle and my knee and my hip.

Q. Have you noticed whether the hip has been getting any better?

(Testimony of Frank Luehr.)

A. No, it isn't getting any better.

Q. Well, are you feeling any more pain there?

A. You say more pain?

Q. Yes.

A. Well, as I said, when I had the relapse it—I had quite a bit more pain in it.

Q. In walking can you tell us, can you walk without the use of a cane?

A. Just a short distance.

Q. And when you do use a cane in what way does the cane appear to help you?

A. Well, it seems to take a lot of weight off my body because I put a lot of weight on the cane and doing so, why, it relieves the pain in my back a great deal.

Q. How about with reference to sleeping as you are at the present time; do you find that you sleep as you did before the accident?

A. No, I don't get any rest.

Q. Well, can you give the Court any idea in any given period how much do you sleep? [194]

A. I probably get not over four hours of rest any night, and since this relapse, why, I don't think I get over two or three at the most.

I have gotten some sleeping pills from my doctor to get me a little bit more rest, and that has helped me some.

Q. Well, is there any position that is more comfortable than any other position in bed?

A. I can't lay on my left side, because it, the pain's too severe in my hip, and I cannot lay on

(Testimony of Frank Luehr.)

my back very long, probably just a minute or two, and about the only position that I have laying in bed is my right side, and you get tired laying on the right side all the time.

Q. Well, at the present time as you are now, well, let us say as you have been for the past month, have you tried to carry anything at all?

A. No, I don't carry anything. I—about the only thing I ever carry, as I remember, is that I carried a little portable radio, I don't think it weighs over eight or ten pounds, into the bedroom one night, like to listen to the radio in bed, and when I did come in there my wife says, "What is the matter with you?" She says, "You sound as though you done a day's work." I had awful short breath, as though I had done a day's work.

Q. In going up and down steps, Mr. Luehr, do you find that you can do that as well as you can walk on a level surface? [195]

A. No, I just take one step at a time. I can't go one step over the other.

Mr. Magana: I think that is all.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until Wednesday, March 19, 1952, at the hour of 10 o'clock a.m.) [196]

March 19th, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

Mr. Resner: Your Honor, please, so that there will be no mistake about the matter which we discussed yesterday, I wonder if I may direct to the Court's attention Exhibit 16. That is the exhibit which shows that the sum of $7,322.32 has been expended on medical; and I want the record to show the agreement between Mr. Luehr and myself as his attorney to repay that money to the compensation carrier, it having been received by Mr. Luehr as a loan.

And the record will further show as we proceed here that the moneys were paid to the doctors in the hospital at what are called industrial rates. We will show, your Honor, as we proceed, that those rates were perhaps half or less than half of the usual rates.

The Court: What relation has the contract between you and your client to do with the issues here in relation to the Government.

Mr. Resner: That this can be recovered. It will be the same as though Mr. Luehr had gone to any third party and borrowed money to pay his medical expenses, which he of course [197] didn't have, and be entitled to recover it back as an item of special damages.

Mr. Harrison: The Government's position is that

unless the law allows him to recover such contract between the parties is entirely outside the issues of this case.

Mr. Resner: We will be prepared to show your Honor under the Longshoremen's Act and under the cases that this is a proper item of damage.

The Court: All right.

Mr. Resner: We also want to direct your Honor's attention to the fact that we tried to get our doctor here, but he had an emergency operation this morning and he will be here at two o'clock this afternoon. We are going to proceed with Mr. Luehr, and when we finish with him that will be our case, except for the doctor, and it may be that we shall not consume the entire morning, but under the circumstances we will have to ask your Honor's indulgence in that.

Mr. Harrison: This is a new development to me in the last five minutes, and I just notified my witnesses we wouldn't get to them today, because I understood the doctor would be here and I assumed he would take the remainder of the afternoon. I am trying to contact a witness to come in this morning, but if I am unsuccessful——

The Court: That is all right. All you need here is good faith in whatever you care to do. [198]

Mr. Resner: Thank you, Judge.

FRANK LUEHR

the libelant herein, resumed the stand, and having been previously duly sworn, testified further as follows:

The Clerk: Frank Luehr to the stand, heretofore sworn.

Mr. Magana: May I ask the Court's permission to ask one more question?

The Court: Very well.

Direct Examination

By Mr. Magana:

Q. Mr. Luehr, in walking up to the witness stand now I think we observed you took your time and walked slowly. Will you, just as a final question, or answer to a final question, tell us why it is you walk so slowly?

A. Well, I would have terrific pain in my back and my hip. I don't know if my leg will break again or not. I am very careful with it. I have had so many operations, I don't feel I want to break it again.

Mr. Magana: All right, that is all.

Mr. Harrison: I assume my cross-examination is first in order, your Honor, although I don't think I should have to do it on all of these witnesses. There are other respondents in this matter. But since I did it on the first, I will be glad to do it this time. [199]

(Testimony of Frank Luehr.)

Cross-Examination

By Mr. Harrison:

Q. Mr. Luehr, did you advance any money out of your own pocket for medical expenses?

A. No, sir.

Q. How long were you working as a stevedore, Mr. Luehr? A. In 1943.

Q. Started work as a stevedore in 1943?

A. Worked in the Fire Department at Willows, about 150 miles north of here.

Q. Then you came up to San Francisco to take a job as a stevedore?

A. Before I went stevedoring, I am sorry, I did work in the shipyards for a couple of years before I came.

Q. What did you do in the shipyards?

A. I was an expediter.

Q. What does an expediter do?

A. Well, I was expediter for the shipwright's department. You have to get all kinds of material, whatever they want they come and tell me what they want and I get it for them.

Q. By getting it for them, what do you mean? Go to the tool shop or machine shop and get the stuff?

A. That is right. I go to the machine shop, to the warehouse, or whatever it might be, for various things—lumber, [200] steel.

Q. Do you have to carry those things personally,

(Testimony of Frank Luehr.)

or do you just go and make sure they were ordered and proper men carry them?

A. I order it and then had a truck ordered to bring it up to wherever it should be.

Q. Was that heavy work at all, Mr. Luehr, or was that primarily——

A. (Interposing): No, that wasn't really heavy work.

Q. Have you ever had any other accidents at all, Mr. Luehr? A. No, sir.

Q. No other accidents at all?

A. No accidents.

Q. Have you ever received compensation before?

A. One time at Willows, as I recall, a truck handle—hand truck hit me in the side and I fractured a rib, and the doctor taped me up, and I was on compensation at that time for I don't know how long, maybe a couple of weeks.

Q. That seems to be an accident, Mr. Luehr.

A. I think it probably would be called that.

Q. Did you ever get hit by a falling sack when you were working aboard the SS Hawaiian Planter?

A. Falling what?

Q. Falling sack. I am sorry I don't have any further information on it. From the compensation records, it apparently [201] happened when you were forty-eight years of age. That was in 1947. The injury was a sprained thumb?

A. Oh, I remember that now. I had forgotten about it. I was working on my car and something slipped, I don't know what, but anyway I caught

(Testimony of Frank Luehr.)

my thumb between the axle and the screen and I did receive compensation at that time. I had forgotten about it.

Q. Well, it appears that the records show you were hit by a falling sack. Sprained left thumb.

A. Falling what?

Q. Sack—s-a-c-k—I guess flour, sugar, potatoes. How do you explain that annotation?

A. I don't remember that. Where was it at?

Q. Your address at that time was 2523 Grove Street. I will show you this to refresh your memory (handing document to the witness.)

A. Would that be for the Matson Shipping Company?

Q. I think the Hawaiian Planter is a Matson ship. Most of those Planter ships are.

A. There was no compensation connected with this.

Q. Nevertheless, you reported an injury, did you not?

A. Oh, I think that—you said a sack of flour?

Q. It says "A sack." I just gave you a sack of flour as an example.

A. I remember that, but there was no broken bones or anything. [202] A sack of sugar——

Q. Sack of sugar?

A. ——slid off, I don't know how many feet, probably ten or fifteen feet, and it knocked me over and by doing so I braced myself on the floor and I sprained my thumb, and they sent me to a doctor

(Testimony of Frank Luehr.)

and had x-rays taken, but there were no broken bones. I didn't have no treatment of any kind.

Q. Now, the compensation records indicate that a week later—that is, on the 17th—this accident happened, apparently on the 9th, 9/9/47. On 9/17/47 there was another accident reported: "While placing box partner pushed from the other side, smashed tip of third finger, right hand."

Do you recall that accident?

A. No, I don't.

Q. Your address was the same at that time, and the employment was longshoreman. It was also aboard the S. S. Hawaiian Planter, from the indications on the compensation records.

A. You said I have a sore finger?

Q. It indicates that you smashed the tip of the third finger, right hand?

A. I honestly and truly don't remember that particular accident.

Q. I see. Thank you. Now, can you recall whether or not there was an accident on May 5th, 1949, at 2:30 p.m., which [203] the compensation records indicate occurred in this manner:

> "While dispatching a sack of coffee from Hatch No. 2 the man was lifting the sack of coffee when he sprained his back."

Do you remember that report?

A. No, I do not. I sprained my back?

Q. That is what the report indicates, Mr. Luehr. Also indicates that there was no loss of time.

(Testimony of Frank Luehr.)

A. No, I really don't remember.

Q. You don't recall that accident at all?

A. That was in 1949?

Q. Yes, May 5th, 1949.

A. Was a report made of that?

Q. Yes, it was. Apparently the report was made to your foreman immediately, and you were working for the Marine Terminals Corporation?

A. No, I really don't recall that.

Q. All right, thank you.

Mr. Harrison: If your Honor please, we will reserve putting these records into evidence until Mr. Patterson from the Compensation Commission is here to properly identify them.

Mr. Kay: We have no particular objection.

Mr. Harrison: I would like to have Mr. Patterson here anyway. [204]

Q. (By Mr. Harrison): Mr. Luehr, before you went to work aboard the Shawnee Trail the day before the accident—I understand you had worked the day before and reported to work again the day of the accident? A. That is right.

Q. Before you went to work the day before, that is, the day before the accident, had you ever worked on a skeleton deck like this before?

A. Never.

Q. Did you feel that this mechano deck or skeleton deck provided you a safe footing, Mr. Luehr?

Mr. Resner: I object to that, your Honor, as calling for the opinion and conclusion of the witness on a matter in which he isn't qualified to ex-

(Testimony of Frank Luehr.)

press an opinion. A longshoreman works where and as directed. If a man decided all of a sudden that particular job he didn't want to work, there would be real chaos. My experience shows these men work when, as and how they are told, and they are not to express opinions about matters of that kind.

Mr. Harrison: If your Honor please, I think the man is the most qualified of anyone of us here to tell us whether or not he thought it was a safe place to work. If he didn't think so—if he didn't think it was so unsafe so as to justify him not working, that is a qualification.

The Court: Let me suggest that what he might think [205] about it couldn't enter into the merits of this case for this reason: It might be a perfect job and perfectly safe and he might think otherwise, to the contrary.

Mr. Harrison: That is very true, your Honor, and I think his beliefs are very pertinent.

The Court: What he may think about it, how is that going to assist us here?

Mr. Harrison: Well, what I was driving at, your Honor, if he had some feeling it was unsafe, I was then going to ask him if he took any special precautions.

The Court: Well, maybe I am blind, but when a fellow works on a job and his job is at stake and it is his livelihood—probably I am unduly sensitive about it, for I know the conditions, I think, better than the average judge at least, for I have had that interest in the human struggle all my life. However,

(Testimony of Frank Luehr.)

I don't want to do violence to the law, but the ultimate facts are the matter I have to make a determination on, not what he thinks.

Mr. Harrison: That is true, your Honor, but it may very well be true, too, that a man thinks it is unsafe, and felt the necessity of his job obliged him to work in an unsafe place.

The Court: Read the question so that we won't get confused.

Mr. Harrison: I merely asked if he felt he had a safe [206] footing at the time of the accident.

The Court: Let the Reporter read it.

Mr. Harrison: Excuse me.

> (Thereupon the Reporter read the question as follows: "Did you feel that this mechano deck or skeleton deck provided you a safe footing, Mr. Luehr?")

Mr. Kay: Pardon me. At this point I would like to interpose my objection on the grounds that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid.

The Court: I will sustain the objection.

Q. (By Mr. Harrison): Mr. Luehr, at the time of the accident, did you consider yourself a particularly agile person?

Mr. Resner: Well, if your Honor please, I am going to object to that as being irrelevant, too. Any question in this case must be related to the matter of proximate cause. The proximate cause of this accident was the falling of this plane through the

(Testimony of Frank Luehr.)

negligent act of another person. What Mr. Luehr thinks, if he were an acrobat or whatever else he may have been, would not have changed the ultimate result where he had no control over the situation. These questions of Mr. Harrison's apparently are designed to excuse the Government of a culpable act, and they have no relationship to proximate cause. [207]

Mr. Harrison: Mr. Resner's objection is nothing but an argument on the ultimate issue in the case. I don't think the objection is proper.

Mr. Resner: Then I will object, if you want me to state it in legal words, I will merely object to his Honor upon the ground that this calls for the opinion and conclusion of the witness on an immaterial matter.

Mr. Cooper: If the Court please, I would like to be heard on that question. The question is proper and material for the reason that contributory negligence has been pleaded in this case, and the man's state of mind, whether it be a fact or not, is pertinent. And I might add further that on the question of being on the job, the longshore walking boss testified yesterday, as your Honor will recall, a man is free to leave the job at any time he wants, and they do.

Mr. Resner: That is absolutely the most novel expression I have ever heard, that a man's state of mind has something to do with contributory negligence.

(Testimony of Frank Luehr.)

Mr. Harrison: I think that is an excellent expression.

The Court: I indicated to Mr. Harrison it is splitting a pretty fine hair, but I will allow it so you will not be disappointed; but I want to indicate to you I am not taking it too seriously.

Mr. Harrison: I understand that, your Honor.

Q. (By Mr. Harrison): Let me ask you, Mr. Luehr, as to whether [208] or not you felt you were particularly agile at the time of the accident?

A. Just what do you mean by that?

Q. Do you feel that you were—well, let's put it this way, strong, had a good sense of balance, in as good a condition, as, say, the other men who were required to work around with you?

A. I think I was.

Q. Do you think that your agility, that is, your ability to go quickly and to retain your balance in high places was as good at the age of 52 as it had been in previous years?

A. Just what is the question again, please?

Q. Well, I will rephrase the question. Don't you agree that due to your age, 52 years old, you were not as agile and strong and as stable as you had been in previous years, say when you were 25 or 30?

A. After a person gets a little older it is natural they are not quite as fast on their feet, probably, or probably not quite as strong; but I think as far as work is concerned, I have always kept up my end of any kind of work that I have done on the waterfront.

(Testimony of Frank Luehr.)

Q. Do you think you could climb about these beams as well as a 25 or 30 year old man?

A. I think I can.

Q. Despite the fact that you were at that time 52 years [209] of age? A. That's right.

Q. Mr. Luehr, is it customary in your experience as a stevedore to steady cargo from underneath it while it is suspended in the air? A. No, sir.

Q. It isn't customary? Who was your boss on this job?

A. Mr. Spirz was the walking boss, and a fellow by the name of Martin—I don't remember his last name—was the gang boss.

Q. If I said Ingbritsen, would that be it? Martin Ingbritsen?

A. Yes, that sounds like the name, yes.

Q. Mr. Luehr, who directed you to go and help steady that airplane? A. Nobody.

Q. You took that on yourself, is that correct?

A. It was my job. That is what I was there for.

Q. Well, who told you that was your job?

A. I was hired out to go on the ship to go to work.

Q. If orders were to be given, who would give them to you?

A. I think it would be Mr. Spirz' orders at that time.

Q. But Mr. Spirz didn't specifically order you to go on that particular job, is that correct?

A. No, sir. [210]

Q. Did Mr. Spirz give you any indication that

(Testimony of Frank Luehr.)

he approved of the manner in which you were doing the job?

Mr. Kay: Just a minute. That is calling for an opinion and conclusion of the witness.

Mr. Harrison: I am asking him if——

Mr. Kay: Just a moment. Let me finsh my objection. Calling for an opinion and conclusion of the witness and no foundation laid.

The Court: Who is Spirz, again?

Mr. Harrison: He is the walking boss.

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

The Court: Did he say anything to you in relation to that?

A. No, your Honor.

Q. (By Mr. Harrison): Was he also steadying the plane during this time? A. Was he what?

Q. Was he steadying the plane at this time?

The Court: Steadying the plane.

A. Well, so far as I remember he was on the catwalk at all times when the plane was being lowered. In fact, he wasn't a working man. He was the boss of the working men, and if he was needed there to help steady the plane, why, I think [211] he did.

Q. Mr. Luehr, do you recall some time in February, 1951, signing the original libel which was filed in this case? A. Signing what?

Q. Signing it. Affixing your name to the original libel.

(Testimony of Frank Luehr.)

Mr. Resner: Better explain to Mr. Luehr what a libel is.

Mr. Harrison: Yes.

Q. (By Mr. Harrison): A libel is the complaint you have filed in this case, the action which you filed against the Government, or cause to be filed.

A. Yes, sir.

Q. You did sign that, did you not?

A. Yes, sir.

Q. And your signature was notarized, was it not? A. I imagine it was at that time.

Q. And do you know that in front of your signature these words appear:

> "Frank Luehr, being first duly sworn, deposes and says that he is the libelant in the within action; that he has read the libel herein and knows the contents hereof; that the matters therein alleged are true to his own knowledge, except those matters therein alleged on his information and belief, and he velieves those to be true."

Now, you signed that, did you not, Mr. [212] Luehr?

A. Yes, sir.

Q. And you believed the allegations in that libel to be true; is that correct? A. Yes, sir.

Q. Is it not true that in paragraph 12 of the original libel——

Mr. Harrison: Which, your Honor, appears on page 4——

Q. (By Mr. Harrison, continuing): ——you al-

(Testimony of Frank Luehr.)

leged that you were making at the time of the accident approximately $100 a week?

A. At the time of the accident?

Q. Yes. Does it not appear in this libel to which you have sworn?

A. I don't remember just exactly how much I was making.

Q. I am asking you, does it or does it not appear in the libel which you signed and swore to?

Mr. Resner: Well, if your Honor please, the libel speaks for itself. What is in it is there, and as your Honor knows all these papers are drawn by the attorneys.

Mr. Harrison: I am asking the witness——

The Court: He wants a record on it.

Mr. Resner: I beg your pardon?

The Court: He wants a record on it.

Mr. Resner: It is in the Court's files, Judge.

Mr. Harrison: I want to know whether this man knew it [213] was there at the time he swore to it, or whether or not it was there at the time he swore to it. I have here a photostatic copy. I believe the original is in the file. With your consent, Mr. Resner, I will cross-examine on the photostatic copy.

Mr. Resner: I have no objection. It is in there. I will say this, the lawyers put the statement in, they might have been mistaken about it, but it is inconsequential. Go ahead.

Q. (By Mr. Harrison): I am asking you, Mr. Luehr, did you swear at the time you signed this libel that to the best of your knowledge you were making approximately $100 a week?

(Testimony of Frank Luehr.)

A. I probably was making approximately that. I don't think I made quite that much at that time.

Q. However, you were willing to swear you were making approximately $100 a week; is that correct?

A. Yes, that is correct.

Mr. Resner: The record will show, Mr. Harrison, there were weeks when the man made more than that. Of course, some weeks he didn't work, depending on the available work.

Mr. Harrison: May I ask the Court's indulgence in asking Mr. Resner not to argue his case during my examination of the witness?

Mr. Resner: I am sorry, Mr. Harrison.

The Court: You will get used to him. He has been doing [214] that so long and he has the habit of doing it, and I realize it would annoy you, but I have been here so long that anything can't annoy me. Don't pay too much attention to it.

Mr. Harrison: I suggest his argument just then suggested further answers to the questions.

Mr. Resner: That is common knowledge to anybody in the industry.

Q. (By Mr. Harrison): Mr. Luehr, you testified yesterday on January 1st, 1950, the year of the accident, until the day of the accident you earned $1,548.78? A. Yes, sir.

Q. From January 1st, 1950, to July 28, 1950, the day of the accident, is approximately 29 weeks. If we divide $1,548 by 29 weeks, it means that your average earnings from the beginning of that year until the time of the accident was $54 a week. Is that correct?

(Testimony of Frank Luehr.)

A. I don't know what it adds up to. I really couldn't say. All I can say, I might have made much more than that one week and I might have made much less than that.

Q. Mr. Luehr, you swore at the time you signed this libel your earnings were $100 a week at the time you were injured. [215]

Mr. Resner: Now, your Honor please, I am going to object to this as being incompetent, irrelevant and immaterial. You can argue that to the Court. He is complaining about the thing that I am even at this time making arguments to your Honor.

Mr. Harrison: Not making arguments, your Honor, asking the man what the average earnings were during that period.

Mr. Resner: The Court will take judicial notice of the multiplication table.

The Court. This is what has occurred to me. Counsel is here asking for $200,000 in the hope that he will get that, and no more. Now, the record here discloses an allegation there that he is making a hundred dollars a week. The answer to that is what the record will respond to, not what he thinks about it or anything. You have got a right to make that showing, that is the fact, let us analyze those facts.

Mr. Harrison: I would like also to indicate to your Honor that the libelant had a tendency at least, on the basis of $23.50, to at least multiply the truth by two.

(Testimony of Frank Luehr.)

Mr. Resner: Now, Mr. Harrison, you know as well as I do that lawyers draw pleadings and they draw them on the basis of the best facts available to them. You are not going to accuse Mr. Luehr of something that his lawyers have done on the information available to them in the industry.

Mr. Harrison: My practice, Mr. Resner, is to ask the [216] client how much he is making before he signs the verification.

Mr. Resner: Well, Mr. Harrison, if we want to get into the business affairs, the discussions we have had, I will be glad to advise His Honor in full, with you.

Mr. Harrison: I most certainly will not, we agreed not to discuss such things.

Mr. Resner: All right, then who is kidding who.

Q. (By Mr. Harrison): Mr. Luehr, let me ask you one more question.

The Court: Don't throw your wrath on me. There seems to be some little difficulty before you.

Q. (By Mr. Harrison): Let me ask you this question: How much income did you report on your income tax form for the year 1950?

A. How much did I? You mean, receive from the Government?

Q. No, how much did you—what was your earnings that you alleged in your income tax?

A. In 1950?

Q. In 1950. I believe yesterday you testified——

A. $1500.

Q. Your income tax return showed $1548.78?

(Testimony of Frank Luehr.)

A. That's correct.

Q. Now, if you earned, as you alleged in your libel, an average of $100 a week for the 29 weeks that you worked, isn't it true that—$100 a month, rather—isn't it [217] true you would have reported considerably more income than $1548.78?

Mr. Resner: Now, if your Honor please, that is calling for the opinion and conclusion, and that is argumentative. The income tax return is here, we put it in evidence, and Mr. Harrison, how he got it, I don't know, or how the Government does a lot of these things, is a mystery to me, but he himself got the income tax return from the Internal Revenue, got the information from the Internal Revenue. Here it is, it is no secret.

Mr. Harrison: I am merely pointing out, your Honor, that if the allegation that he earned $100 a week is true, an average of $100 a week is true, he should have reported about $2900 earnings instead of $1500. Now, if that is argumentative I will argue.

Mr. Resner: I think you should.

Q. (By Mr. Harrison): You remember how much your take home pay was out of your earnings?

A. No, as I said before, some weeks I made much more than I did other weeks.

Q. How many exemptions did you claim on your income tax A. Just one.

Q. Just yourself?

Mr. Resner: In 1950?

(Testimony of Frank Luehr.)

Mr. Harrison: In 1950. [218]

Q. Do you know exactly how much you received by way of compensation to date, Mr. Luehr?

A. Yes, I think it is around $3,000.

Q. Around $3,000. How much did you receive a week? A. $33.32.

Q. $33.32. Have you always been receiving $33.32? A. Yes, sir.

Q. Isn't it true that for a while you received $35 a week? A. No, sir.

Q. You never received $35 a week?

A. No, sir.

Mr. Harrison: Excuse me, your Honor.

Q. You are sure you never received a check for $35 a week?

A. Oh, yes, I was just going to call your attention to it, they did send me a $35 a week, I don't know how many weeks, maybe a month or maybe six weeks, but then that was *the* deducted off of one of those checks, so it would make me $33.32 all the way through.

Q. Now, that is correct. Now, do you know why they reduced it from $35 a week to $33.32?

A. No, I do not.

Q. You do not know? A. I do not know.

Q. Did you inquire?

A. No, I did not. [219]

Q. Do you have any idea what the medical expenses have been taking care of you in your case, Mr. Luehr?

(Testimony of Frank Luehr.)

A. We—I was told in the neighborhood of around $7,000.

Q. Have you any complaint concerning the treatment that you were given?

A. Not one bit.

Q. Mr. Luehr, we noticed your difficulty in walking here, how long have you been able to walk on a cane? A. You mean my cane alone?

Q. Yes, sir.

A. I don't remember exactly, but it must be probably a little over three months now.

Q. How long were you on crutches?

A. Ever since I have been out of the hospital.

Q. Except for this three months?

A. That's right.

Q. Were you confined pretty much to the house while you were on crutches?

A. When I first came home I didn't go out only when I had to go to the doctor; that was twice a week. And I used my crutches to get from the house to the cab at that time, and the cab to the hospital.

Q. I see. Did you gradually improve though, to get out more frequently?

A. Not with my cast on. I walked very [220] little.

Q. Then is it your testimony except for trips to the doctor you were confined to the house?

A. Was I confined to the house, did you say?

Q. Yes, except for the trips to the doctor?

A. No, the doctor didn't tell me not to walk on

(Testimony of Frank Luehr.)

it, he told me to step on my leg if it was possible, you know, if it didn't pain me too much.

Q. Well, did you do anything other than stay in the house and go back and forth to the doctor?

A. No, sir. Oh, maybe occasionally to the store and back, which is next door.

Q. Didn't you find an occasion to visit your attorney in Los Angeles? A. Did I what?

Q. Didn't you find an occasion to visit your attorney in Los Angeles? A. No, sir.

Q. You never went to Los Angeles?

A. No, sir.

Mr. Resner: I visited him many times, Mr. Harrison, and Mr. Magana. We came to see him often.

Q. (By Mr. Harrison): How old are you now, Mr. Luehr? A. 53.

Q. 53. Well, you say you were in good health at the time of this accident, is that correct? [221]

A. Yes, sir.

Q. How much did you weigh at the time of the accident?

A. I think about a hundred and ninety-eight pounds.

Q. About a hundred and ninety-eight pounds, very close to two hundred. What do you weigh now?

A. I think around about a hundred and nienty, I would say.

Q. Mr. Luehr, how long do you think you would have remained working as a stevedore had this accident not occurred?

(Testimony of Frank Luehr.)

A. Well, that is pretty hard to tell.

Q. Can you give us an estimate?

A. Well, if this accident hadn't occurred I would have probably worked as a stevedore for maybe quite some time.

Q. Well, Mr. Luehr, you think you would have worked until you were 75 years old?

A. Well, that is pretty old being on the waterfront.

Q. How about 65 years old?

A. Well, that is ten years younger, that is possible that I would still be there.

Q. You might be still there at 65?

A. Possibly.

Q. Probably not much after that, is that correct?

A. I don't know, it is awfully hard to answer.

Q. How much in earnings do you believe that you have lost to date?

A. You mean from the time of the [222] accident?

Q. Yes, till now.

A. Well, considerable. At the time of the accident, at the time about one month after the Korea war occurred, and from then on the work had been plentiful. I know that some of the men probably have made five thousand or more just this last year in 1951.

Q. Wasn't the work equally as plentiful in World War II? A. Was it plentiful?

Q. Yes.

(Testimony of Frank Luehr.)

A. Yes, I think it was quite plentiful at that time.

Q. You remember what you earned in those years?

A. Well, the wages were much lower than what they are now. I think we were making only, it seems to me it was $1.15 at that time.

Q. Do you remember, any idea what you earned in those years, though?

A. No, I couldn't say.

Q. Mr. Luehr, do you want to go back to work if something can be found that you can do?

Mr. Resner: Now, if your Honor please, I think that is irrelevant because that depends upon the medical testimony as to what the doctors think.

Mr. Harrison: I qualified it by saying if something can be found that he can do.

Mr. Resner: If you are going to offer him a job at the [223] wages he was earning as a longshoreman at something he can do, I think he will take it.

Mr. Harrison: I am not going to offer him a job, but would like to show that he can certainly earn something which must be deducted from his future loss or earnings.

The Court: If you can show that.

Mr. Harrison: Well, I think I would like to know how the witness feels about it.

Q. You wouldn't like to go back to work at something if you could do it?

A. Certainly. I worked hard all my life.

Q. What are you doing with yourself all day now? A. Read, listen to the radio.

(Testimony of Frank Luehr.)

Q. M-hm. Have you ever thought about preparing yourself for some other kind of work?

A. I have not.

Q. Have you attempted to learn any skill with your hands? A. No.

Q. Have you attempted to learn some paper work, task, at all?

A. No, I never had—I never had the opportunity to do that at all.

Q. Well, have you taken the last year and a half where you have been laid up too—have you taken that opportunity? A. No, sir.

Q. To try to improve yourself in any way so that you might [224] take a task, a sedentary job should it be offered to you?

A. No, sir, I haven't.

Q. Why haven't you?

A. Well, I guess I never thought about it, maybe thinking that if I ever get strong again I would go back to work again.

Q. You know that a man in your condition is not necessarily confined to an idle life the rest of your life. I give you as an example the boys that are shot up in Korea, and in the last year, the amputees, and so forth, that come back. We have had some marvelous examples of the boys who have made for themselves a useful life even though they have lost the use of their limbs. Did you ever consider that, Mr. Luehr? A. Oh, yes.

Q. And yet you chose not to do anything about it?

(Testimony of Frank Luehr.)

A. I can't do anything at the present time; I can't do a thing.

Q. You can read, can't you?

A. Read? Oh, yes, I can read.

Q. You could, if you get to and from the doctor, you could get to and from some class in hand skills, could you not?

A. How can I work in the condition I am in, with a painful back?

Q. Is it your testimony that you couldn't study any kind of skill with your hands or practice a skill with your hands at this time? [225]

Q. We realize that. Getting back to the accident, Mr. Luehr, how long were you on the mechano deck before you were knocked off?

A. Well, now. I don't remember the—just the amount of minutes or what it would be, but I do remember climbing on to the mechano deck when the plane was in such a position over the structure that it could be lowered. Now, just where the plane was at the time that I got on the mechano deck, I don't remember, exactly, maybe we will say 30 feet.

Q. M-hm. But you climbed up on it after you saw that the plane was coming on the inboard side of the ship? A. Yes, sir.

Q. Now, I'm still not clear exactly where you were with relation to the airplane at the time of your injury. Could you describe that for us once again exactly where you were and why you were there?

A. When I climbed on to the mechano deck, like

(Testimony of Frank Luehr.)

I say, there was no ladder there, just get on the best way you know how.

Q. How did you get up there?

A. I don't remember just—you see that brace going, you might climb up on that brace.

Q. I see.

A. One way or another. I was on this beam on the inshore side. I wasn't in any way of the plane if it would have dropped that I would have got hurt at that time. But as the [226] plane was coming down to about, I would say, six feet, I mean between—of the mechano deck, the plane to the mechano deck, the plane stopped. The man, what they call the whistleman, blew his whistle, and the plane stopped, and as it stopped I walked forward to help steady the plane.

Q. Walked forward. Did you proceed along one of those beams?

A. Just on one of those beams, yes.

Q. M-hm. Now, what position did you assume by or underneath the airplane?

A. Well, it is a man's job to do the best he can by steadying the plane so as the wings are not damaged, the fuselage is not damaged in any way, and I just imagine that this plane was probably stopped at that time, that maybe the wing was so in the position that it probably could have hit something. Why it stopped, I don't know. But as I walked over I grabbed ahold of this plane as quick as possible to keep it from going this way, you know, when you're on a ship and the plane is on a barge,

(Testimony of Frank Luehr.)

there is always a little give, you know, to it, and it probably doesn't stand still at all times, so you have to steady these.

Now, the best I remember is that I grabbed ahold of this plane with my left hand in the position which would be on that strut, nothing else to get ahold of, what they call the tripod, and my right hand on the fuselage in this position (indicating).

Q. I see. Why was your right hand on the fuselage, was that [227] to steady yourself?

A. Probably to help steady——

Q. Steady the plane or yourself?

A. I can't stand over here.

Q. Why not?

A. How can—I would have fallen off.

Q. You would have fallen onto the——

A. Fallen off to the main deck.

Q. That is why, so that your other hand on the plane was to steady yourself primarily?

A. That's correct. Now, when I had hold of this plane trying to steady it—the whole plane dropped so fast. Now just exactly what hit me, whether the fuselage or the wing, I don't remember, but it dropped just as though the line was cut, and the whole plane—I don't know what it weighs, probably four ton, five ton, I don't know what it is came down so fast it hit me on my left shoulder, and as it did it threw me forward with my head hanging to the main deck.

Q. I think we all understand that; all I was

(Testimony of Frank Luehr.)

getting at was the position which you assumed near the airplane.

Now, I want to be clear, were you standing on an athwartship beam or on a fore and aft beam?

A. On an athwartship beam.

Q. Have you ever stood on one of these fore and aft beams, did you at any time during this operation stand on one of those fore and aft [228] beams? A. Not at this time.

Q. Did you, when you were walking about?

A. I might have, I don't remember.

Q. How high from the deck did you feel that you were, how high is the mechano deck, in your estimate? A. You mean from the main deck?

Q. Yes.

A. Well, I assume it is around seven feet, eight feet.

Q. Seven or eight feet. Were there any walking boards or scaffolding placed on the mechano deck to make for better footing? A. No, sir.

Q. There were not. Were there any platforms strung beneath this mechano deck, such as the kind of platforms that hang over the side for the use of men going to paint, I think you know what I mean, kind of suspended on ropes or metal hooks?

A. Nothing like that.

Q. No platform? A. Not that I recall.

Q. Were there any ropes or lines you could hold onto that you could steady yourself with while you were on the mechano deck?

A. Not in the business I was in. The lines that

(Testimony of Frank Luehr.)

they use are probably way out on this wing or in this wing, and forward and not on the after end of the plane. [229]

Q. Well, were there any other ropes or lines not attached to the airplane which you could have held onto to steady you? A. No, sir.

Q. No ropes were strung at all on the superstructure of the vessel? A. No.

Q. Did you see any safety precautions that were taken to prevent the men from falling, being thrown to the deck below?

Mr. Kay: Just a moment. I object to the form of the question, the words "safety precautions," it calls for his conclusion. Furthermore, it would call for the conclusion of an expert and he hasn't been qualified as an expert, and the term "safety" is entirely relative.

Mr. Resner: I might point out something else to Your Honor that counsel for the government seems to overlook.

Mr. Harrison: Mr. Resner, are you going to argue that again?

Mr. Resner: I am making an objection if I can, Mr. Harrison. First, I will say, Mr. Harrison, that the question calls for the opinion and conclusion of the witness; that it is objectionable because it is incompetent, irrelevant and immaterial, and in support of that I will tell your Honor that this vessel was built by the United States, they owned it.

Mr. Harrison: Isn't that argument?

(Testimony of Frank Luehr.)

Mr. Resner: Built the superstructure. Well, may I proceed, [230] Mr. Harrison?

They built the ship, they gave it to the men and said here, use it to load planes on it. Now, these men don't have any choice, they work where they are told and, therefore, his opinion and conclusion about it is completely irrelevant.

The Court: His objection goes to your arguing the case. The jury is absent, you are arguing the merits of the case to me. You recognize that you have a legal right to object legally to the question. Now, let us read the question.

(Question read by the Reporter.)

Mr. Kay: Your Honor, the further objection that no proper foundation has been laid, no showing here that any safety precautions were required, and it would be beyond the scope of the direct examination, not proper cross-examination.

Mr. Harrison: Your Honor please, I asked if there were walking boards, scaffolding, platforms, lines to steady himself and he said no to all those. Now, it is to avoid the possibility that I have missed any other apparatus that may have been rigged to prevent the men from falling that I have asked him. I will change the words "safety precautions" to "apparatus."

Mr. Kay: That is different. I mean, if he is asking him about specific things that were or were not there, then the man can answer.

The Court: Very well. [231]

(Testimony of Frank Luehr.)

Q. (By Mr. Harrison): Then to cover all possibilities I will ask you whether any apparatus placed on that mechano deck to prevent the men from falling to the main deck below?

Mr. Kay: I am going to object again, your Honor. It calls for the conclusion of the witness, the words, "To prevent the men from falling below," that takes in a lot of territory. He can ask this witness if there were, as he has already asked, any lines, any ropes, any platforms, or any other objects.

The Court: I suggest you reframe your question. The objection will be sustained.

Mr. Harrison: I believe I have taken in all the possibilities that I can think of, your Honor. I am not a stevedore and I don't know what——

The Court: We will make a stevedore out of you before you get through.

Q. (By Mr. Harrison): I will ask you this, Mr. Luehr: Was there any place where you could have stepped back to avoid being thrown to the main deck when this plane fell?

Mr. Resner: I object to that, your Honor, on the ground the witness testified this thing came so fast he didn't have a chance to do anything.

Mr. Harrison: If he did have a chance, was there a place to step?

The Court: Overruled; you may answer. You understand [232] the question?

The Witness: Yes, I do.

The Court: You may answer.

(Testimony of Frank Luehr.)

A. No, there was no place of any kind to go to. I couldn't step back nohow.

Q. (By Mr. Harrison): In fact, if you had taken any motion at all to avoid this airplane you probably would have fallen to the main deck, I take it? A. That is correct.

Mr. Kay: Your Honor——

The Court: Let me offer a suggestion. You see where we are going. I think we are all agreed this thing came down! Where could he go under circumstances of that kind?

Mr. Harrison: Well, if your Honor please, the Government's contention is this——

The Court: I say that advisedly.

Mr. Harrison: Yes. May I explain the purpose of these questions is that we feel that the steadying of the airplane—I am not talking about placing the platforms underneath the landing gear—the steadying of the airplane did not necessitate the man being directly underneath the airplane. If there had been places for him to stand other than underneath the airplane if they had planking or walking boards, he could have done this job standing, as the safety code provides, out of the fall of the cargo. Now, it is our contention that—— [233-4]

The Court: It would be hard for me to follow that if I was sitting as a juror. Now, you may not be able to make some sort of showing, keeping in mind this airplane, as far as the record is concerned, you have to take the physical facts as they are there, and to say that you can't get under,

(Testimony of Frank Luehr.)

shouldn't get under an airplane when it is coming down, it would be hard for me to say you could or could not.

Mr. Harrison: If your Honor please——

The Court: She swaying, and what not.

Mr. Harrison: Well, the sway is exactly one of our arguments, your Honor, that the very sway of the airplane could have knocked this man off the mechano deck and that the reason that he had to go under it to steady it was that there was no place else for him to stand in that there was no place for him to steady it, he could have done the job, had there been space for him to stand by steadying against the wings. We will show that there were numerous men steadying this airplane.

The Court: I don't know the theory of the case, but who built that?

Mr. Harrison: That, I believe, was built by Kaiser Shipyards in Portland, your Honor.

The Court: Under whose instruction?

Mr. Harrison: I believe it was the Government.

The Court: If it is defective how can the Government [235] complain?

Mr. Harrison: I am not saying that it is defective, I am saying, your Honor, it has an inherent danger which could have been corrected by providing boards.

The Court: However, I don't want to interfere.

Mr. Harrison: I think that we are all in agreement as to what did happen, and there were no

(Testimony of Frank Luehr.)

boards provided, and the rest is really a matter of argument.

I was going to ask the witness as my next question why was it necessary to stand directly underneath or so close to this suspended airplane?

The Court: You may answer.

The Witness: Can I stand up and show you?

Q. (By Mr. Harrison): Sure.

A. When you're standing on a six or eight-inch beam, I don't know what they are, when you stand in this position and the plane is over here (indicating), how can you hold it? You can't steady it, you can't do anything. I was standing in the position like this with my left foot over the beam, the plane was over, we will say, in this position. I was reached like this, under, holding the strut, and probably with this hand maybe in this position on the fuselage. That position, why, I am that far underneath the plane.

Q. Then it is your testimony that it was necessary to stand in that position because there wasn't any other place to [236] stand?

A. Wasn't any place to stand, and you can't steady the plane by holding against it, because nothing there to hold.

The Court: We will take a recess.

(Short recess.) [236-A]

Mr. Harrison: I only have one or two more questions, your Honor.

Q. (By Mr. Harrison): I just want to make

(Testimony of Frank Luehr.)

it very clear in the record, Mr. Luehr, did you take orders from anyone else other than employees of the Jones Stevedoring Company?

A. Meaning Mr. Spirz?

Q. Mr. Spirz and Mr. Ingbritsen?

A. That is right. No other.

Q. No one else? A. No one else.

Q. Did Mr. Rosenstock ever give you any orders at all?

A. No. I don't even know the man.

Q. You don't even know who Mr. Rosenstock is?

A. No.

Mr. Harrison: I believe that is the only thing I have, your Honor.

Cross-Examination

By Mr. Kay:

Q. Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and a hold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct?

A. That is correct. [237]

Q. And whether there were any planks or not on the mechano deck, you had to stand where you were to do that particular job; is that correct?

A. That is correct.

Mr. Harrison: I object to this line of question-

(Testimony of Frank Luehr.)

ing. The witness testified he was there to steady the airplane.

Mr. Kay: Why, your Honor, this is cross-examination. He has had his cross-examination and I am entitled to cross-examine within the direct examination and within any questions Mr. Harrison has asked on cross-examination.

The Court: The objection may be overruled. Proceed.

Mr. Kay: May I have the question and answer reread?

(Question and answer read by the reporter.)

Q. (By Mr. Kay): Now, the strut you had hold of is the part of the plane on which the wheel would normally be, is that correct? In other words, instead of a wheel they had this tripod in that position in libelant's Exhibit 14; is that correct?

A. That is right.

Q. That tripod down there (indicating)?

Mr. Kay: You see that, your Honor?

The Court: Yes.

Q. (By Mr. Kay): That tripod and that strut is underneath the wing of the plane, out a little bit from the fuselage; isn't that correct? [238]

A. Yes.

Q. And in order to hold onto that you have to get somewhat under the plane; isn't that correct?

A. That is correct.

Q. Now, Mr. Luehr, if there had been planks as the Government suggests, and you were doing this same job, and the plane came down just the way

(Testimony of Frank Luehr.)

it did in this instance, as though the lines had been cut, giving you no warning, and with a sudden drop like that (snapping fingers), and if there had been planking on that area, what would have happened to you?

Mr. Harrison: Following Mr. Kay's method of trying this case, I object as asking for an assumption of the witness.

Mr. Kay: No, the witness is there.

Q. (By Mr. Kay): You can visualize the planking? Let's assume there was planking there; is that correct?

Mr. Harrison: There wasn't. He testified there wasn't.

Mr. Kay: The Government says we should have planking.

Mr. Harrison: You are asking him to assume what would happen, isn't that a better phrasing of the question?

Mr. Kay: No, based on your assumption, I think he can answer the question.

Q. (By Mr. Kay): Do you understand my question?

A. I understand what you mean.

Q. Will you be able to answer it? [239]

A. In the position that I was standing at the time, or in the position that I would have been standing if there had been planking there, there wouldn't be any difference. I would have still had to be in the same place, partly underneath this particular plane.

(Testimony of Frank Luehr.)

Q. All right, let me ask you this: When you got hurt, you say you were crushed down and your head hanging down below that beam here. As I understand, one foot was over on this side, the left foot was on this side of the fore and aft beam out here, and when you were hit you were crushed down and the left foot remained over, and your head hanging down below this thwartship beam, is that correct, after you were hit by the plane?

A. Yes, that is right.

Q. And your hands hanging down to the deck; is that correct? A. That is right.

Q. And when the plane bounced back or was taken back, whichever it was, you were released and you slid down to the deck; is that correct?

A. That is correct.

Q. If there had been planking over here, your body and your head wouldn't be down in that position. You would be right against the planking; is that correct? A. That is right.

Q. And in that case you might have been crushed to death? [240]

A. I wouldn't be here to tell about it.

Mr. Kay: That is all.

Mr. Harrison: Well, let's get this straight, your Honor——

The Court: Pardon me.

Mr. Harrison: Oh, excuse me.

Mr. Cooper: If the Court please, counsel seems to make speeches, so I can be permitted to do so, may I not? I might say, your Honor, I was brought

(Testimony of Frank Luehr.)

up in the Sacramento Valley and we used to get up a sweat there in the harvest season.

Cross-Examination

By Mr. Cooper:

Q. I wanted to ask you, Mr. Luehr, I believe you testified you worked in the Sacramento Valley in the harvest season?

A. Will you speak up a little louder?

Q. I say, did you work in the Sacramento Valley in the vicinity of Willows in the harvest season?

A. Yes.

Q. Did you ever work on a combine harvester?

A. Well, running tractors, mostly.

Q. Never worked on a grain harvester?

A. That is correct.

Q. What job did you do?

A. What was that?

Q. I say, you say you worked on grain harvesters. What job [241] did you do on it?

A. Well, I was running a tractor most of the time, harvesting grain.

Q. Did you ever work on the combine itself?

A. Oh, yes.

Q. What did you do on it?

A. I don't remember. Probably tending harvester, I think.

Q. You were a header tender, were you not, what is called a header tender?

A. You can call it that.

Q. That is the man who sits on the seat and

(Testimony of Frank Luehr.)

lowers and raises the knife that cuts the grain; is that correct? A. That is correct.

Q. And that is what you call a header tender. At least, did when I was brought up. You sit there under an umbrella, as a rule, to protect you from the sun, do you not? A. I did what?

Q. I say you sit there under an umbrella to protect you from the sun, do you not?

A. Oh, yes.

Q. Mr. Luehr, you said before this unfortunate accident occurred you had climbed up on the mechano deck? You had climbed up on the mechano deck from the deck below; is that correct?

A. That is correct. [242]

Q. Had you previously worked on the mechano deck of that ship?

A. On that particular ship?

Q. Yes. A. Yes, sir; I had.

Q. You had been up there before?

A. Oh, yes.

Q. Had you performed the same sort of job up there before that you did at the time of the accident?

A. I don't remember. I don't recall if I did the same kind of job. Each time a plane comes, you might be in a different position. You may be holding onto a wing, you may be holding onto something else, stand at the end of the wing so that you can grab hold of it.

Q. So that different men took up any position they chose to take up; is that correct?

(Testimony of Frank Luehr.)

A. That is right.

Q. You didn't get any special order to do a special job? You took up whatever position the job seemed to require; is that right?

A. That is correct.

Q. And on other occasions you say you had hold of the wing of the plane?

A. When I say a hold of it, I mean on the end of the wing. You can't grab hold of the wing in the middle because you have [243] no way of holding it.

Q. I see. Then each time a plane was landed, would some of the men talk hold of the end of the wing, as you say? A. That is right.

Q. And you had done it on prior occasions?

A. Oh, yes.

Q. Did anybody take hold of the tail of the plane in order to steady it?

A. There is no tail.

Q. Pardon me? A. There is no tail.

Q. It is cut in the middle, is it? The tail had been cut off; is that correct?

A. The tail is cut off of the main part of the plane.

Q. Only part of the fuselage was with the plane?

A. Right behind the wheels.

Q. I see. So when you say—I guess another witness can tell me that, but on occasion did some of the men stand at the end of the fuselage, the rear end of the fuselage, and take hold of that?

(Testimony of Frank Luehr.)

A. This is the end (indicating). This is the rear end of the fuselage.

Q. This round object, is that the rear end or the front end?

A. That is the rear end of the fuselage. This pointing that [244] way is pointing toward the catwalk.

Q. I see. And that is the nose? That is the end, the one pointing toward the catwalk is the nose against which Mr. Spirz, the walking boss, had his hands; is that correct? A. That is right.

Q. Then this part here where it is cut off at about the wings, all you can do is push against that; is that so?

A. Yes. You can push against it, but you can't hold it in any way at all. There is no way of holding it. There is nothing to hold onto.

Q. You can just push against it from coming in your direction? A. That is right.

Q. What are these two objects I see on either side?

A. I don't know. Probably where the tail is connected to it.

Q. Mr. Luehr, after you had gotten on the mechano deck, and before you moved toward where the plane was hanging suspended, did you wait until the plane had stopped being lowered?

A. You mean before the accident?

Q. Yes. A. Yes.

Q. You are standing over on one side of the mechano deck on one of the beams?

(Testimony of Frank Luehr.)

A. That is right. [245]

Q. Did you wait until the plane reached a point of suspension before you moved over toward it?

A. Oh, yes.

Q. How many feet did you go, as near as you can recall, from where you were standing to get hold of the plane?

A. I would say maybe six feet, maybe eight feet. I don't know.

Q. In order to do that, you walked along the thwartship beams of the mechano deck; is that right? A. That is right.

Mr. Cooper: That is all.

Mr. Harrison: I have one or two things I want to straighten out, your Honor.

Recross-Examination

By Mr. Harrison:

Q. I interpret your testimony to be, you were up there to steady the airplane?

A. That is right.

Q. Did you have the platform with you that was going to go underneath the wheel?

A. The platform already was underneath there.

Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform? A. No, sir.

Q. Were you going to fasten it?

A. No, sir. [246]

Q. You were there to steady it; is that right?

A. That is right.

Mr. Harrison: That is all; thank you.

Mr. Resner: We have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Resner: Aside from our doctor, your Honor, that is the libelant's case, and our doctor, as we advised the Court earlier, will be here at two o'clock. Unless counsel has something, I would like to ask your Honor for a recess at this time, and Mr. Magana and I will spend the next half hour getting the medical records in shape so that we can expedite the examination this afternoon.

The Court: Is that agreeable, gentlemen?

Mr. Harrison: Agreeable, your Honor.

Mr. Kay: That is agreeable, your Honor.

The Court: Take a recess until two o'clock.

Mr. Resner: Judge, may we have a stipulation from counsel so that we can withdraw the medical records in order to arrange them and go through them? Have you any objection?

Mr. Harrison: No.

Mr. Kay: Stipulated.

(Thereupon, at 11:30 a.m., an adjournment was taken to the hour of two o'clock p.m. this date.) [247]

No. 13562

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For the Ninth Circuit.

UNITED STATES OF AMERICA,

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Appellees.

Apostles on Appeal
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(Pages 360 to 736)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-30-53

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Wednesday, March 19, 1952—2 o'Clock P.M.

The Court: Proceed.

Mr. Magana: Your Honor, to expedite the examination of the doctor, I have some X-rays that I have taken from libelant's Exhibit 1 and also libelant's Exhibit 3, together with some X-rays that were taken at the doctor's office or under the doctor's supervision.

Since there are a number of them, I was thinking in order to refer to them logically, may I at this time mark them, for example, 1-A, 1-B, and so on, depending on the order they come in?

The Court: If that is the usual procedure, the Clerk will conform to it. Is that all right, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Magana: Thank you.

The Court: I depend a lot upon the Clerk in these matters.

Mr. Magana: The first X-ray, which was taken from libelant's Exhibit 3, may that be marked 3-A?

(Thereupon, X-rays previously admitted into evidence collectively as libelant's Exhibit 3, were marked libelant's Exhibits 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I and 3-J.)

(Thereupon, X-rays heretofore admitted into evidence [248] collectively as libelant's Exhibit 1 were marked libelant's Exhibits 1-A, 1-B, 1-C and 1-D.)

(X-rays were marked libelant's Exhibits 20 through 36, consecutively, and admitted into evidence.)

Mr. Magana: May I call Dr. Walker?

HARRY R. WALKER

called as a witness for the libelant; sworn.

The Clerk: State your full name and occupation to the Court.

A. Harry R. Walker.

Direct Examination

By Mr. Magana:

Q. Doctor, you are a physician and surgeon, licensed to practice here in this state, are you not?

A. Yes, I am.

Q. Would you briefly, but without any modesty, tell the Court your background for the purpose of judging your qualifications?

A. I graduated from the University of Louisville, Kentucky, School of Medicine, 1939. Had a rotating interneship in Flower Fifth Avenue Hospital, New York City. I was assistant resident in surgery at Flower Fifth Avenue Hospital; Fellow in Orthopedic Surgery at Mayo Clinic, Rochester, Minnesota; residency at Crippled Children's Orthopedics at the Shrine Hospital in St. Louis. I spent six years in the Navy as an [249] orthopedist.

Q. Would you generally tell the Court what the field of orthopedics implies?

A. It is the study of the musculo-skeletal system, which means the study of bones, joints, nerves and skin.

Q. Are you on the staff of any hospitals in the Bay Area? A. I am, sir.

Q. What ones?

(Testimony of Harry R. Walker.)

A. Children's — East Bay Children's Hospital; Merritt Hospital; Providence Hospital; Peralta; Richmond Hospital, and the Alameda Hospital.

Q. All right. You, in effect, are the treating doctor, the man who has been following Mr. Luehr and treating him for his condition since July 28th, 1950, right? A. Yes, sir.

Q. And you have been——

The Court: Pardon me. 1950?

A. 1950.

Mr. Magana: 1950; yes, sir.

Q. That is correct, isn't it?

A. That is right, yes.

Q. He has been your patient since that time and to the present time; is that so?

A. That is correct, sir.

Q. We have already given the Court the background of the [250] times Mr. Luehr was in the hospital. Would you, briefly, without reference, for the present, to the X-rays, outline your observations of Mr. Luehr from the moment you first saw him? In other words, give the Court a bird's eye view of what Mr. Luehr's condition was at the time and how it progressed.

A. Yes, sir. I first saw Mr. Luehr on July 28th, as I recall, approximately at noon. I was called from the office by Dr. Joseph Marriott of Alameda, who stated that he had a man that had been severely injured and was in shock.

I rushed over to the hospital and we took him immediately to surgery. He was in a very precari-

(Testimony of Harry R. Walker.)

ous position at that time. He had a—superficially, his blood pressure was way below one hundred and his pulse was very rapid. He had a compound fracture of his leg, left leg, which was giving us the most concern. We were also sure he had a tremendous concussion injury of the chest because of his breathing and his short respiration.

We did straighten out the leg, and gave him several transfusions and, well, more or less life-saving methods were the things that were used first. As he progressed, we put a Kirschner wire through his leg to take care of the tibia and fibula fracture—that is the compound fracture here—then placed him on a splint, then a cast. At about the fourth or fifth day he began to respond fairly well, and we [251] were able to get some more X-rays and find out he also had severe fractures of the ribs, both on the left and the right side.

Approximately twelve days, I believe, to two weeks — anyway, after the cast, he developed thrombo-phlebitis of both legs and a mesenteric thrombosis which gave him a paralytic ileus.

Q. Doctor, you have lost me. Would you mind——

A. I will explain. This thrombosis is a blood clot that occurs in the veins. His mesenteric thrombosis—that is the supporting structure to the bowel, and he developed what we call a paralyzed bowel. In other words, he ballooned way up with obstruction. There was no gas, no movement of the bowels. And I might add he had interference with all the

(Testimony of Harry R. Walker.)

elements, in other words, the kidneys, bowels, and those things. He had to have a catheter in his bladder, and he had to have rectal tubes and enemas. In other words, they were not functioning.

By conservative measures we were able to put a Miller-Abbott tube into his mouth, into his esophagus, down into his stomach and intestines, and drain off some of the fecal content. We also had a rectal tube in him, and a tube in his bladder which took the place of function. We fed him by vein for approximately a week to ten days.

All during this time he was in such a [252] precarious position, that is, riding on the fence, we didn't do too much about his leg. We finally got him so that his chest was aligned and he was able to breathe fairly well, and got his pressure up, and approximately a week or ten days after the obstruction began to clear up, his temperature went down, and he began to look like we were going to salvage—as I told him, salvage his life.

And also our problem was to make a useful citizen of him. So we had already applied his leg cast, we dressed his wounds, and he kept complaining of the back and swelling in the right ankle, which we had neglected to take pictures of at first because it wasn't dislocated and obviously not very severely damaged compared to the other injuries. We found out he had a fractured astragalus.

Q. We don't know what that is.

A. That is the bone in the ankle which is called the—I don't know, astragalus is about all. It means

(Testimony of Harry R. Walker.)

the weight bearing bone in the ankle on the lateral side, in other words, the outside. This is on the opposite foot.

We had to put a splint on that, and that responded very well. At least, it relieved him of his pain. And he kept complaining of pain in his back. We knew he had a contusion of the cord, in other words, he had cord symptoms which are referable to some of the other symptoms he had, poor coordination in his leg. His bladder was not functioning and [253] his bowels were not functioning.

When you say "cord symptoms," are you referring to the spinal cord? A. Yes.

Q. When you say "a contusion of the cord," what do you mean by that?

A. We mean it had been traumatized. In other words, it had been jarred out of its position in the spinal canal, so to speak.

Q. Just pause there for a moment. You said something about a thrombo-phlebitis and called it a blood clot. How did you know he had that?

A. He started to run a temperature, and his legs swelled, and he was tender along the course of the femoral veins and along the iliac veins which go into the abdomen, and when he developed the paralytic ileus on top of that with complete cessation of all functions of his bowels and peristalsis, which is the normal way they contract, we knew—that is what we made our diagnosis on of thrombophlebitis.

Q. Go ahead, Doctor.

(Testimony of Harry R. Walker.)

A. Then following this he remained in the hospital and continued to improve slowly. We gave him numerous transfusions. After approximately three months we were able to get the wire out of his leg which we had tied the bones together with. They were completely denuded of skin, tibia and fibula, and [254] we tied the bone together and bound them with a splint. In other words, the least trauma we could add to his already precarious position, the better.

We began dressing the leg and he was feeling considerably better, but still complained of the pain in his back. We took X-rays of his back and found he had not only a fractured and compressed lumbar vertebrae, I believe L-1, but it was also posteriorally dislocated.

Q. What do you mean by that?

A. I mean it was pushed backwards clear out of position which is the normal position of the vertebrae approximately one-half inch, which accounted for the contusion of the cord and various cord symptoms and neurological symptoms he had.

Following this we thought his bladder and bowels began to function. He had sensation in his lower extremities, so we decided to neglect the back and let his general condition improve. After approximately three, three and one-half months, we were able to get him up and about on crutches and start his locomotion. But since that time—that was his first admission. That was up until about November, 1950. Then after that he was admitted for change

(Testimony of Harry R. Walker.)

of cast several times, and he has also had three or four admissions to Merritt Hospital for what we call saucerization, cleaning out of infected bone and dirt and material in this compound fracture of his leg.

The second time, he had no covering over his leg, so [255] he had skin flap transplants and another saucerization. This gave him more circulation to the infected and traumatized area and all over the fractured area.

I did that in two procedures, I believe, one on the right and one on the left, and grafted skin off the other leg. He continued to drain until, I think the last time we had him in was in August. Although improved, he was still draining in August, and we hospitalized him again and had to take out a considerable amount of bone in the sinus tract right down to the marrow, into the medullary cord, and we took all the anterior cortex of the tibia. It was evident at that time his fracture had healed and we were able to take—able to do without the cast.

Q. All this about the tibia, you will be able to show that better in the X-ray?

A. Yes, we can show that in the X-ray.

Q. Go ahead.

A. During this time he has been up and walking with the aid of a crutch or cane, usually two crutches. He says the leg does not bother—the tibia does not bother him so much, but he has pain in his left hip and in his back. He feels better and

(Testimony of Harry R. Walker.)

he has less muscle spasm and motion in his back if he has crutches under his arms and straightens out his spine. His general health has improved markedly. His ill humor certainly is much better, and his disposition, outlook [256] on life is better. He was very depressed and we had quite a few rounds with him to get him in shape, but his general condition is much better than it has been. He still has some other things that have to be done, but that is the picture to date.

Q. All right, then, to make it clear, as of this date you are still treating this individual; is that right? A. Yes, sir.

Q. And you, as his private doctor, have not yet released him from further treatment?

A. No, I have not.

Q. To give the Court some background, then, before I ask you about the prognosis——

Mr. Magana: Your Honor, how would the Court prefer the X-rays be shown? I want the Court, if the Court wishes, to see these X-rays.

The Court: Well, the usual way. The Clerk will handle it. I depend a great deal on the Clerk. You may all get over in the jury box, if you wish.

(The witness went to the shadow box.)

Q. (By Mr. Magana): Now, Doctor, I am going to hand you, and each time I will have to refer to it by the exhibit number, libelant's Exhibit 3-A. Would you place that in the box, and I am particularly interested in the left clavicle. If you will orient the Court? [257]

(Testimony of Harry R. Walker.)

A. The clavicle, or breast bone, are these two bones here. Here comes the clavicle, which is the right. There is the shoulder and the breast bone. This is the end of it and this is the normal contour. This is the injured clavicle, or the left one. This one here is broken in the outer third, an oblique fracture, and it has approximately one-fourth of an inch displacement.

The contour of the shoulder blade seems to be perfectly normal. There is evidence of some fractured ribs down here. Just how many, it is hard to see on this type of film.

Q. At all events, Doctor, to clear this up, this is not a compound fracture?

A. No, sir; this is a simple, oblique fracture of the left clavicle.

Q. And there are other X-ray views that show this did heal?

A. That healed in good position and he has solid bony union now.

Q. So far as you are concerned, he has no further complaint from that clavicle region?

A. He hasn't voiced any to me recently, no. We had some trouble with that at first from walking on crutches, but recently I have not heard any complaint about that.

Q. Then putting in libelant's Exhibit 3-B—would you put it in, Doctor? You can orient the Court as to the left side, [258] first, as distinguished from the right?

A. I will put the heart on the left side. This is

(Testimony of Harry R. Walker.)

the heart shadow. This is the left side. Also, it is marked on the film. He has several fractured ribs, as you can see. The first that you can note—let's see, this is the first rib, the second rib looks like it has a crack in it. The third rib definitely is fractured, with considerable displacement of the fractured fragments.

The fourth is completely off and overriding here. The fifth is cracked transversely there. Our X-ray man thought the sixth was, but that is purely academic. It isn't displaced and the damage here is from the ones that are displaced and impinging on the lung. I thought from some other picture he had a fracture of the lower rib on the right side.

Q. I think the record will show he had another injury prior to this. He did have an old fracture of the right lower rib.

A. There is one there in the right lower rib, but they are held, as you can see, in good position.

Q. So far as the ribs are concerned, then, what was the progress with reference to those? First, does he have any disability at the present time from the rib fractures that you have outlined?

A. I think not now. They were a big complication to us at first, of course, due to the abdomen being distended and blown [259] up, and the pain. He couldn't breathe deep enough to keep his lung blown out. Of course we worried about pneumonia and other things at that time. But in general we survived the troublesome part of the ribs, and I don't think they are a complication now.

(Testimony of Harry R. Walker.)

Q. Whatever further X-rays show, from an orthopedic point of view, or Mr. Luehr's point of view, you would say he need not expect any disability from the ribs as such?

A. I don't think so. Of course we have check X-rays on him, as a matter of fact, showing them healed in good position.

Q. Fine. Forgetting the ribs and going to the ankle, I show you libelant's Exhibit 3-C, and would you orient the Court there?

A. This is the right ankle.

Q. How do you know that?

A. It is marked "right," and the fibula is on the right side.

Q. That then—excuse me—is the bone we can feel right here (indicating)?

A. That is the lateral side, or the outside, of the ankle. They call it a skier's fracture. It is the one most usually hurt and the one most usually sprained. That is the triangular ligament, or deltoid ligament, and here is a fracture here. This was taken in 1950, July. It shows fracture. This bone has been pulled out by the ligaments, out of [260] the astragalus. It does not show any damage at this time, nor any damage to the medial malleolus. This is one of the original films.

Q. Tell us with reference to the bony content of this picture, the mineral content, how does that appear?

A. Perfectly normal. The position of the joint,

(Testimony of Harry R. Walker.)

I might add, is good. That is what you call a good joint reduction.

Q. I will hand you libelant's Exhibit 20. I will hold libelant's Exhibit 3-C and you put libelant's Exhibit 20 into the box. This is still the right ankle, is it not?

A. This is the right ankle. Look at it this way (indicating). Doesn't make much difference. You asked me how I can tell right from left. Sometimes I can't.

This picture was taken in March, 1952. This shows your fracture here as these little fragments haven't adhered entirely. There is also calcification developing in the ligament as far as, running from the lateral malleolus over to the astragalus.

This was the original. It isn't present there. You can see it in this film clearly. Also shows he had some damage to the other side of the astragalus in the ligaments. I don't think this is a fracture. I think this is a ligament pulled off the bone. That is the supporting structure of the ankle. That has calcified in this position.

Q. What can you tell us about the mineral content of the bones we see there on this film? [261]

A. As you can tell, these are markedly demineralized. The density is much less and the calcium much less than that in a normal bone. You can tell that by looking at the two films.

Q. Of what significance, Doctor, is it that the picture, referring particularly to 3-C for the moment, and comparing it with libelant's Exhibit 21,

(Testimony of Harry R. Walker.)

of what significance is it that you pointed out there was evidently some additional calcification over that period of time?

A. Well, that is what we call post-traumatic changes in the joint itself. In other words, that is the way we tell whether a joint has been injured or not, the amount of calcification in the ligaments, extent it is torn, extent of calcification. This was significant both with reference to the density of the bone and the calcification, and what we call post-traumatic arthritic changes are all due to the shock or injury the joint has received, and the extent of them we can judge years later by the appearance in X-rays, as I have described, the atrophy, density of the bone, and the calcification that appear there. As you can see, there is none in this picture.

Q. Since approximately some eighteen months separated the two pictures, what, in your opinion, based on reasonable medical certainty, is the prognosis with reference to that right [262] ankle?

A. It certainly has gotten worse in the last eighteen months, we will say, or the last year. In other words, he is undergoing more active changes now in the ankle. I cannot predict how much he will go through. Some of them have a few and stop. Others go on and get along all right. In other words, if they hurt them again, they might kick up and start all over. So it is like a rheumatic joint, depends on the weather and their activity.

Q. All right; leaving, then, the ankle, I want

(Testimony of Harry R. Walker.)

to put libelant's Exhibit 3-D, which was taken July 28th of 1950.

A. This is the date of injury. You can see this is just an X-ray taken right fast at the hospital after we had straightened the leg out. The leg at first was bent back in this position (demonstrating). This bone was sticking entirely through the skin.

Q. To make the record clear, the fibula or tibia?

A. This is the fibula and this is the tibia here, completely displaced, both of them, and it is shortened approximately one inch in that picture. It was released and we jiggled it any way we could and we straightened it to fix the blood vessels and the nerve.

Q. What do you say about the knee joint itself? Is there anything there?

A. I don't see anything outstanding. At most there would be this little depression here. In other words, a person has [263] some injury to his knee, and force sufficient to break the bone in the vicinity of the knee—but we didn't pay much attention to the knee. It looked fairly good there.

Q. How is the mineral content in that bone we see there?

A. That is very good. This is a normal content here, and that gives you a good idea of the normal appearance. This is the spongy bone around the knee which takes the shock of the body.

Q. Yes. Also soft tissues at the outside; is that correct? A. Yes.

Q. Does that appear swollen?

(Testimony of Harry R. Walker.)

A. Yes, that is markedly swollen. That is unusual for it to be that swollen except in severely traumatized wounds. I mean, that soon after that.

Q. 3-F was taken, July, 1950.

A. This demonstrates what I was discussing a while ago. This bone fracture, this tibia, directly oblique; and this, the edge was sticking through the skin. The patella tendons fasten to the fragment and raises the leg like that. I went in, raised the whole thing up and sewed through the skin and left the other leg dangling.

Q. Is this picture, then, this 3-F, taken after you had partially reduced the fracture?

A. When I had already put traction on it. Here is another fracture I forgot to mention, a fracture in the lower third [264] of the fibula, too. Right here (indicating) I had forgotten it.

Q. This, to be clear, is the left leg?

A. Left leg. Left tibia, left fibula. It is a compound comminuted fracture of the first of the left fibula, another comminuted compound oblique fracture of the upper first of the left tibia.

Q. Libelant's Exhibit 3-F, I believe, again is taken the same day, July 28th. What, if anything, does that show?

A. That shows a fracture I had forgotten about in the lower third of the fibula. I think that the ankle is all right. I don't see anything unusual there, unless—no, I think that is old. I think that is just his age and hard work. I don't see anything

(Testimony of Harry R. Walker.)

unusual in the right ankle. Looks approximately all right to me.

Q. How is the mineral content?

A. That looks fairly normal to me. The trabeculations are obvious.

Q. I don't know what that is.

A. That is what lines the bone.

Q. 3-G was taken in August, about a month after the accident, or slightly less?

A. This shows how the fracture was after we had reduced it. In other words, after we put traction on it. This isn't a good picture, to be frank, of a compound fracture. But, as [265] I told you, we couldn't hold the fragment without putting in a wire, pin or screw. It was too dirty. So that we put this wire through and left it inactive until we could remove it, and we removed the wire about six weeks, eight weeks later, got it out of the way, because they keep the infection going; but we got it fairly well reduced. We have there an overriding of approximately a half inch, and it is brought out in this position.

We didn't worry about the fibula because it isn't the main weight-bearing bone. I think you will see in one picture the fibula has union, too.

Q. Does this picture show the man in a cast?

A. Yes, that is a cast out here, but it is a very light, thin cast. Probably a posterior mold, which means we left it open to dress the wound.

Q. Medically you men speak of an open reduction. Will you tell us what that is?

(Testimony of Harry R. Walker.)

A. Open reduction means the use of a knife, opening the skin up further, coming in with tools and things to reduce it. A closed reduction is one where the skin is not broken and you manipulate and handle it without going into the fracture site.

Q. What did you do here? A. An open.

Q. What about the fibula? Was that open? [266]

A. I don't know. We didn't pay much attention to the fibula. It was unimportant.

Q. The next picture, libelant's Exhibit 3-H, is another taken exactly one month after the accident, August 28th.

A. This again shows him in a cast, and shows the position pretty well. Shows we brought him down some with traction. One of the wires had been removed. This shows a comminution. As a matter of fact, I threw away, in other words, fragments of bone that were dirty. This shows very good position. In anything you could tell through the cast, it looked all right grossly.

Q. Any evidence of infection?

A. Yes, he is draining all the time. This was an open wound, but you could tell through the cast. We know it is infected. We see the evidence.

Q. Now, coming to libelant's Exhibit 1-A, and also 1-B, both taken in February of 1951—February 1st, 1951. A. Do you want both together?

Q. I think so.

A. This was approximately four to five months after the injury. This was—seven months. This also shows here he has had an operative procedure.

(Testimony of Harry R. Walker.)

First I will show you this. The fibula is lining up fairly well. I will show you another view later, that shows a union. He is beginning to show union and show callus down laterally. That is uniting [267] there. There is very little callus anteriorally, and medially.

Q. Medially? You mean inside?

A. Inside. This shows less infection. It has been taken out surgically by me. This hole and this hole shows infected granulation tissue which we had to clear away when the wires have been removed. We were trying to get the infection down so we can cover this with something. Contact is pretty good, and I think the skin grafts are taking. The skin graft over here, I think the general condition is poor. You have to have strength and vitality. We heal many cases not with excellent doctors, but by feeding them minerals and vitamins, blood plasma, and so forth, and when you get them in shape you can start your reconstructive surgery. This is in the first stage. This is about six or seven months later.

Q. At this point, I know you said something inadvertently, that you neglected the back for a period of time. Actually, you couldn't attend to the back until this was cured?

A. That is right. The back was not giving us too much trouble because he had to be in bed anyway. As long as his bowels and kidneys functioned he had sensation to his leg, you leave it alone.

(Testimony of Harry R. Walker.)

Q. What about the mineral content of the bone around the knee? [268]

A. That is markedly demineralized. The patella shows it more than the knee. This is normal density here, but these areas are lessened or decreased density, and also osteoporosis. That is a fancy name meaning demineralization, calcium being pulled from this supply to be put in the breech, so to speak, and it also comes from disuse as you get older. If you don't use a joint or a bone, you don't need the calcium and it is taken out and used elsewhere.

Q. When you speak of bone atrophy or disuse atrophy, is that synonymous with that word osteoporosis that you used?

A. They are used synonymously. Osteoporosis can be used to describe demineralization in older people with painful backs. You have probably seen cases where the vertebrae collapses. [269]

Q. Now, I want you to put up——

The Court: If you have any trouble with these medical terms, call it to my attention, will you?

The Reporter: Yes, sir.

The Court: All right.

Q. (By Mr. Magana): I am going to put up for you, put up two more exhibits, Exhibits 1-C and 1-D, both of them taken in April of 1951.

A. This shows approximately the same as the other that we just took down. It shows this beginning to heal, the fractures uniting at both anterior and posterior here. Now, the fracture lines become

(Testimony of Harry R. Walker.)

less distinct, you can see some demarcation of the distal fragment to the anterior fragment, pushed down in this way, pushed together, united, we don't care about the shortening, we give this fellow a fairly straight, firm, solid leg.

Q. You mentioned shortening. Does this man have any shortening of one leg?

A. Yes, about three-quarters of an inch. I say about, because I never get the same; I measured it, but I get within one-eighth of an inch, I would say.

Q. Then in this particular picture, referring to libelant's Exhibit 1-E, I notice an area in here that appears to be slightly blacker than the surrounding area.

A. That is the area of saucerization, just like saucer plus ization, where I have scooped out this bone and cleaned [270] out the infected bone and cleaned up the tissue, the dirt, various things, and the sinus tracts and the evidence of infection.

Q. I wonder at this point if you would tell the Court about how wide in circumference would this tibular bone be if you were to cut through it and look at it from above?

A. You mean cut through it transversely, like so (indicating)?

Q. Yes.

A. It is about an inch and a half in diameter at that point. It varies one way or the other.

Q. Would you explain to the Court as that bone is made up is it just solid, like a piece of marble?

A. No, it is hollow like a pipe. If you can—this

(Testimony of Harry R. Walker.)

is the cortex, the outer firm cortex on each side, and here is the marrow, so to speak, which is the heart of the bone where the blood vessels and the nerves and where the regeneration goes on, the blood cells.

Q. This is solid up here, but cancellus or soft bone?

A. That is right in the middle between the two, upper third of the tibia as it goes into the knee.

Q. Did you have to go into the marrow?

A. Yes, we had to go into the marrow and clean it entirely out.

Q. Then is the anterior or the front surface of that man's tibia at that place gone? [271]

A. It is entirely scooped out, yes.

Q. Will it grow back in?

A. I don't think so, not as cortex. It will grow in from the bottom and will vascularize. The scar tissue usually calcifies over a period of years and form just like the fracture, the callus that forms around the fracture forms in this.

The Court: Where on the picture is the drain coming from?

The Witness: It is coming from this hole here; you begin to see little holes and crevices in here.

The Court: Is that confined to just that immediate area?

The Witness: Yes, sir; it is.

The Court: Doesn't go any further either way?

(Testimony of Harry R. Walker.)

The Witness: Goes down to the marrow approximately one to two inches.

The Court: How are you able to reach the drain?

The Witness: You cup them out like this (indicating) and have curved instruments with what we call curettes, have a little spoon, and you go and you can tell the difference between scar tissue and normal marrow. If you can't, you go down until you bring out normal marrow, take the whole thing out, the scar tissue and affected granulated tissue.

Q. (By Mr. Magana): Tell the Court where, then, is the source of this infection; is it in the cortex or in the marrow? [272]

A. It is in the marrow. It was all uncovered, it was completely outside, full of dirt, the pants legs, we got some of that out, and underwear, socks, anything that will catch on it.

Q. Put into the box the next exhibit, which was taken on March the 15th, isn't it?

A. It is 1952, this is the last.

Q. Yes, if you will put both of them in.

A. All right, sir.

Q. We put in Exhibit No. 21 and Exhibit 22. Now, would you just—this, then, was taken just a few days ago, is that right?

A. Taken last week.

Q. All right.

A. This shows the bone to be healed, the fracture, well, is almost completely healed. See the callus coming, this is the upper end of the shaft,

(Testimony of Harry R. Walker.)

this is the lower end of the other shaft, completely united, it is solid clinically, it is very firm.

Q. Where is it united, Doctor?

A. Right at the fracture site.

Q. At the back or front?

A. Clear across, all the bone there now is united. He doesn't have the front portion of the cortex, the anterior third of the bone is gone for approximately two and a half, [273] three inches that has been taken out.

The Court: I am so limited, I have been looking at these X-rays for 40 years, I haven't gained very much headway. Tell me now, that bone, what is separating them, what material, if any?

The Witness: This one here (indicating)?

The Court: Yes.

The Witness: That is a non-united fracture of the fibula which he asked me a while ago why didn't I line that up. That little bone isn't important, it isn't the main weight-bearing bone.

The Court: I understand that, but wouldn't it be helpful if you did unite it?

The Witness: I don't think—we don't notice the difference. This carries the load, in his case it might have been, but it wasn't worth the risk of going in there and stirring up infection in the little bone that is of questionable importance.

The Court: Don't look at me too severely, I am not criticizing you.

The Witness: I am trying to explain it.

(Testimony of Harry R. Walker.)

The Court: I started out by telling you how little I knew about that.

The Witness: Yes, I know.

The Court: I always want to be informed. Now, you [274] discovered that separation early?

The Witness: Yes, we knew it all the time; yes, sir, all the time.

Q. (By Mr. Magana): You might, in taking Mr. Luehr's leg, will you tell the court, in order to reduce that fibula as it was separated in July of 1950, how would you have had to reduce it if you were going to?

A. You would have to open it up and you might spread the infection, and your dirt, and stuff into this area.

The Court: Is that the area infected?

The Witness: No, sir, it is not. This one was not punctured out through the skin.

The Court: That is what I thought.

The Witness: And you asked the question of separation, the scar tissue is holding them together, now.

Q. (By Mr. Magana): Excuse me, Doctor, but in a tibia fracture how far down do you have to go in order to make the open reduction of the tibia, say, at the proximal one-third of it?

A. You have an incision approximately eight inches.

Q. In length? A. In length.

Q. How deep would you have to go?

A. Into the tibia?

(Testimony of Harry R. Walker.)

Q. Yes. [275]

A. Down to the other side of the tibia, which is one and a half or two inches, maybe three at times. You can see on his leg probably a little better what the problem is, but to get back to what the Judge is talking about, when you have fractures here, two bones, and they are severe, you always line up the main weight-bearing bone——

The Court: The one that is most useful?

The Witness: That is right, and let the other follow along, and if it is necessary to fix it, you fix it later.

Q. I will ask you then, these are taken March 15, again of this year, 1952, Libelant's Exhibit 24 and 23, these again show the condition as it existed as of last week, is that right?

A. That is right, as of now. And this shows that he has healed very well, very solid union of the tibial fracture, shows the non-union of the upper third of the fibula fracture, shows the bony solid union of the lower third of the fibula fracture, it shows this saucerized area here. The defect in the bone can be seen very plainly. This is outlined there and as it is outlined here.

Q. Now, with reference to the mineral content of those bones, Doctor, can you tell us what their present condition is?

A. It is still demineralized as you see here. These are the trabeculation or projectural lines, as they are called, [276] although it is better than it was on the last film that we showed. In other

(Testimony of Harry R. Walker.)

words, more calcification, more movement now, he is using his knee now and it is beginning to return gradually, although there is marked decalcification of the bones about the knee.

Q. At this point, Mr. Luehr, would you step up here just a minute, please, since we are finishing up with the leg.

While Mr. Luehr is coming up here, he has complained, Doctor, of an inability to move that left leg much beyond a 90-degree level in a flexion movement. Can you tell the Court is there anything on these X-rays that would account for that?

A. Yes, but not entirely so. Most of that is soft tissue. In other words, scar tissue around the joint, and it in general is just an atrophic joint. Take a normal joint, put a cast on for nine months or a year, and it has a terrible time opening it up.

Now, this osteoporosis makes the joint sore and tender, too, and that would tend to slow it down. In other words, we start out with practically no motion and gradually open it and we are very pleased to have 90 degrees in this man.

The Court: If you had been here all the time you would see how you were improving every day (to the libelant).

The Witness: I had to pull these out many times to convince him. [277]

Mr. Magana: Doctor, would you show the Court now on Mr. Luehr the area of the——

A. This is the wound site, as you can see. This is where the fragment stuck completely out. As a

(Testimony of Harry R. Walker.)

matter of fact, it was stuck out here; where the skin is over here, I borrowed from here and spread it over there, and the skin that is on this side I borrowed from over here about an inch, slid this over. He has still some draining in there, although much less than he has had in the past, and I have been keeping my fingers crossed in the hopes it will settle down and won't have to saucerize it again. An X-ray man, my partner, several other doctors, seem to think that we will have to saucerize. I think I agree with them that we will have to clean it out, slow it down, because he is so much better.

(Witness illustrating on libelant's leg.)

The Witness: He goes back past 90, there is 90 degrees, and he will go about five degrees past that. He doesn't like it much, but we are forcing him more all the time trying to get him——

The Court: Trying to get the circulation so that it will stimulate it?

The Witness: The healing?

The Court: The weak parts.

The Witness: Yes, sir, the healing, have to get circulation. You see, this was completely open here, and until you [278] get good skin over this you are just up against it. In other words, the bones won't heal, the infection won't go away, or the skin won't heal at all. You can see it shortened it, you can measure it, it is just about three-quarters.

Q. (By Mr. Magana): While we are on this question of that infection there, Doctor, tell us, with

(Testimony of Harry R. Walker.)

reference to that infection, what is there that prevents it from spreading?

A. Well, penicillin has been our greatest help that we have had, and some new antibiotics. Nature throws a wall around the infection. Say that you get a boil or a carbuncle sort of infection, first it is red all over, and pretty soon it narrows down to a little hard area. That is nature's arrangement of protecting or walling it off. There is always a danger of spreading it by surgical intervention. Consequently when I go in to scrape it out it is apt to spread in the blood, but with antibiotics that is possibly you wouldn't spread it too much, the big danger of that spreading.

Now, he still has an infection in there. If that wound should swell over, the pus would build up and go into the medullary canal. That is why I have to clean it out again.

Q. What about if he were to suffer any future damage to that, such as tripping, falling or knocking against it, would that tend to reactivate the infection at all?

A. Oh, yes, it is very liable to trauma.

The Court: See how he is helping himself [279] now?

The Witness: Yes, Frank's done a lot of this under protest.

(Testimony of Harry R. Walker.)

The Court: Well, but I figure you got him persuaded now; it is in his interest, too.

The Libelant: He don't wait on me any more.

The Witness: He has to take care of himself in the office now, and we have been able to get him going fairly well.

Q. (By Mr. Magana): Now I am going to put Libelant's Exhibit No. 29 in the box. I wish you would explain that to the Court.

A. This is a lateral view of the lumbar sacral spine, lumbar sacral spine meaning where the backbone fastens onto the pelvis or tailbone. This is the angle of the lumbar sacral joint here. The angle looks fairly normal. The cartilaginous space in 3, 4 are normal, but in the fifth they are completely collapsed and there is raw bone riding on raw bone, has an unstable joint.

Q. Doctor, he complains of a distribution of pain down from the buttocks on down the back of the leg. Is there any connection between that and what you observe from this Libelant's Exhibit No. 29?

A. There certainly could be for three reasons. One is injury to the upper lumbar spine; two is injury here, his lumbosacral area. In other words, this is just loose fibula [280] joint, like a wheel without the bearing, the cushion is gone. The distribution of the pain seems like it comes more from this area. The other thing that causes the pain he complains about upon the left side is his hip. He

(Testimony of Harry R. Walker.)

has some degenerative changes in the left hip which can account for this pain.

He has three reasons, and I couldn't say just which one is primary, because the reason I doubt if it is the upper segment of this lumbar spine, although I am more inclined to believe it has to do with the lower sacral joint or the hip joint itself.

Q. Is that because of the particular nerve that goes——

A. Goes down the side. In other words, the distribution for the high nerve is more in the pelvis and in this area, goes over the trochanter of the hip and down the side, the sciatic nerve.

Q. This X-ray that I have shown you, Libelant's Exhibit 29, was taken last week, again by you, March 15. Now, I want you to put in Libelant's Exhibit 3-I, which was taken the day of the accident, July 28, 1950.

A. This is July 28, 1950.

Q. Yes.

A. This one here, this is the left side.

Q. Now, if you will, Doctor, orient us first.

A. This is the left side right here; this is the right side. These are the lower ribs on the left, these are the lower ribs [281] on the right, 11 and 12, and I was right, he had a fresh fractured rib right here, it shows it, of the 11th, on the right.

Q. On the right side? A. Yes.

Q. That is a fresh one?

A. Yes, that is a fresh fracture. He had some old fractures there, too, but—all right. Now, these

(Testimony of Harry R. Walker.)

are his ilium or pelvis bones on the left, these are the hip bones and hip sockets on the left and the right. They are perfectly normal, contour here is normal, joint space seems to be normal with the exception of one on the right. It seems like he has an extra ossification, which is anatomical.

Q. No relation——

A. I think it is an old injury of childhood or a congenital thing.

This first is, shows the lumbar vertebrae, 5, 4, 3, 2, 1, D-12, dorsal 12, or you can count 12, 1, 2, 3, 4, 5. This shows the damage to the first lumbar vertebrae here. See that it is squashed down, these are fragments of the fracture out to the side, pushed out here. This is the transverse process that is completely off on the right side of the first and of the second. Those seem to have all—yes, it is off on there.

Q. What is this, Doctor, that line that I notice right in [282] here (indicating)?

A. That is a fracture of the lamina which goes right down through the middle of the vertebrae, this vertebra was just squashed and just pushed out and mostly back. I can demonstrate that on another film.

Q. On the side view? A. Side view.

Q. Now, with reference to the transverse fractures, as I understand it, as the Court is looking at this light, it would be towards the left as if——

A. This is the right side (indicating).

(Testimony of Harry R. Walker.)

Q. And you said there was a fracture of the first transverse process?

A. There it is, right there, and completely displaced. It is clear off. This is a normal transverse process here.

Q. That was the day of the accident, and calling your attention again to the first lumbar vertebra and the line that appears there, I think we have a spinal canal here which will ilustrate this in a moment. Would you put on Plaintiff's Exhibit or Libelant's Exhibit, excuse me, 30, which was taken on the 15th day of March of 1951?

A. This is the right side again; this is the left side. This shows your fracture very plainly now, 11 and 12, of the ribs, on the right side. On the left you can see that this fracture line here almost is completely obliterated. [283] It seems as if the body of the second lumbar vertebra has completely fused with the body, what is left of the body of the first. There does not seem to be complete union across here between 12 and 1. You can hardly tell the normal architecture of the vertebrae. This transverse process is still completely off on the side. This one seems to have held together. On the second, fourth, third, and fourth on the right side seem to have some trauma to them, but they are held there in good position, certainly shouldn't give him any trouble.

Q. If you had, Doctor—excuse me, would you hand me that—this is just a small skeletal model.

(Testimony of Harry R. Walker.)

Would you pick out for the Court the first lumbar vertebra?

A. (Demonstrating): This is the first lumbar vertebra, the 12th thoracic, the dorsal has the rib on it.

Mr. Resner: Turn it this way.

The Witness: This is the first lumbar here, first one below the twelfth, or you can count either 5, 4, 3, 2, 1, count them either way.

Q. You spoke of the lumbo sacral joint?

A. That is this, the swayback joint, so to speak.

Q. I think you said there was a mark through the back of that?

A. The lamina here, that means right there, right through here, demonstrated very clearly in the X-ray. That was very [284] marked.

Q. And where does the spinal cord go down?

A. The spinal cord goes right down here, this piece of metal goes right down inside the vertebrae, and the nerves come out through these little openings, that is the body and that is the lamina, that process in the back. In other words, in the vertebrae and the fossils they have large spinus processes to protect the cord, and very small bodies.

Q. And the cord as such, where does it end?

A. It ends as such at about the level of the 12th, one or two. They vary. From there on you have small nerve fragments that come off.

Q. All right. Libelant's Exhibit No. 31 is a picture taken the 29th of October of last year, 1951, about four and a half months ago. I want you to

(Testimony of Harry R. Walker.)

show the hip joints and sockets to the court, orienting us first with right and left.

A. This is the right on this side; this is the left over here. That is the hip joint, the pelvis, and a portion of the lumbar spine and the sacrum. On this side, which is the right, the joint looks normal, the space in between the articulating surfaces are smooth. You see this extra-ossification center I called your attention to a while ago, and the density of the bone appears normal, although it is a little thinned out. It is near enough normal for his age, size and activity that he has had during the past year. [285]

On this side you can see considerable demineralization of the trochanteric region, the upper femur and head of the femur and the acetabulum, that is just the cup for the hip. Compared to this side you can see the bone is very much more dense on this side than on this side. These are shot at the same time, same film, same exposure. There is some narrowing of the joint, but not much. I wouldn't pay too much attention to that.

Q. I want to show you Libelant's Exhibit No. 2, would you put it in the way you want it, taken last week. Point to the left hip for the Court.

A. This is the left side, this is the right side over here. It is also marked that way on the film. This shows more demineralization, particularly the upper shaft of the femur. There are some jagged edges developing and narrowing of the hip joint on this side. There is a considerable amount of demineral-

(Testimony of Harry R. Walker.)

zation of the acetabulum here compared to the opposite side.

Q. He complains of pain when he lies down on the left side or when he attempts to walk, that he favors that left side quite a bit. Looking at that left side Libelant's Exhibit No. 32, can you account for it in any way?

A. As I said, there are three ways. Certainly if this is all he had you can say this gave him the pain, in the hip, but also his leg on that side which takes more weight, and [286] the lumbar sacral spine was undoubtedly damaged in this injury, and he has this injury up above, I would say that this is due mostly to his pressure, to the changes going on in his hip, and secondly to the instability or unstableness of the lumbar sacral spine.

Q. Considering there were four and a half months between the previous radiogram, Libelant's Exhibit 31, and this one, Libelant's Exhibit 32, can you tell us now, basing your opinion on reasonable medical certainty what the prognosis would be with reference to that left hip in this man if he continues to use his leg?

A. Well, in the last five months, as the X-ray shows, it is undoubtedly going through a post-traumatic regressive change. In other words, it is degenerating from the hip itself, and the bones about the hip, the joint itself.

Q. What do you think the future holds for Mr. Luehr?

A. I don't know. He undoubtedly will have some

(Testimony of Harry R. Walker.)

permanent damage in the hip joint, but just how much he is having now we can't say, because it still is in active process. It may clear up, and it may stay right where it is.

Q. Will it get better?

A. It may, but most of the time they lose the pain, but they don't get any more motion, they stop right where they are, or go on and run the course and have more pain and more damage. It certainly would get worse with more activity and [287] usage right now.

Q. In September, 1950, just shortly after this accident happened, would you put this view in the box, that is September of 1950, and it is Libelant's Exhibit 3-J. Now,——

A. This, you can see here, this is the fifth lumbar, fifth, fourth, third, second, first, here is the last rib which you can see. This vertebra, this vertebral body here of the first lumbar vertebra, it has been completely squashed, smashed together, pushing fragments of bone in this direction, but mainly dislocating the entire vertebra approximately one-half back through the spinal canal.

Q. Using another shot just on the side there, Doctor, would you indicate to the Court diagrammatically using that other X-ray merely as a ruler to show what displacement there has been toward the cord proper?

A. This shows better than this one.

Q. This next one, Libelant's Exhibit 33, which

(Testimony of Harry R. Walker.)

was taken just a little while ago, wasn't it, March 15?

A. That is right. This shows the dislocation of the vertebra much plainer and shows the spinal canal coming down here fairly well until you get to the first lumbar vertebra, and there it is impinged at least half to three-quarters of the width of the canal, so much it is closed almost, this aperture, entirely. Here is the normal aperture where [288] the nerves come out. This is still pretty good, not so large. It is half the size here and about a fourth here.

Q. And what has happened to that forward portion? You told us previously that the first lumbar vertebra had some pieces that had been pushed out; what has happened?

A. They seem to have united onto the body of the first and also attached to the body of the second. In other words, you have got a spontaneous fusion there of the two vertebra, of the first and second, of the bodies, and I think that they are also solid back here from looking at the anterior. Pretty hard to prove by X-rays, but I think they are.

Q. When you say solid back here, where do you mean?

A. Back here, pointing to the posterior portion of the lamina in the spinus process in this area here.

Q. Now, you have in here, this is another shot taken in between——

The Court: Did you say you had some more?

(Testimony of Harry R. Walker.)

Mr. Magana: I am just going to conclude with just one——

The Witness: No union between the twelfth and first, I meant.

Q. (By Mr. Magana): Would you put up Libelant's Exhibits 34 and 36 so we can conclude the X-rays?

A. These are the obliques that show a bony union in between the first and the second all the way across, shows no union between the twelfth and the first. This is a little different [289] view here. This is the twelfth here, this is the first and the second, and you can see complete bony union across there. This has not united up above, which would be desirable if we had a fusion.

Mr. Magana: Does the Court wish to recess now?

The Court: I think we better take a recess.

(Short recess.) [290]

The Court: Proceed, gentlemen.

Q. (By Mr. Magana): Now, Doctor, that you have been through the X-rays and the general outline of what transpired in this case, tell us, you received a history from this man about the happening of an accident, is that right?

A. Yes, sir. Rather spotted, though. He was unconscious, mostly, at first.

Q. The record will show he claimed to have received a crushing type of injury. Are these fractures and all these injuries a type that would, in

(Testimony of Harry R. Walker.)

your judgment, come from a crushing type of injury? A. Yes, I think so.

Q. As Mr. Luehr sits here now, and as your patient, giving us only your opinion on reasonable medical certainty, first of all, is there any further immediate treatment that he needs?

A. Yes. The wound will have to be saucerized again and the defect, as you can see, the scar, will have to be closed.

Q. In connection with that, will that require hospitalization? A. Yes, it will.

Q. For how long a period of time?

A. Approximately two weeks if everything goes according to schedule, get no recurrence of his infection, etc. [291]

Q. Can you tell the Court what the reasonble value of his hospitalization per day would be in such a case?

A. Hospital care has gone up so much recently, runs around $20, $25 a day as a rule. That is food, drugs, board, everything.

Q. What would the services of a surgeon be?

A. I would say around $250, $300.

Q. And in that operation you say a saucerization would take place, is that right?

A. That is right. Cleaning out again, getting the scar tissue out of the way, and the affected granulated tissue.

Q. When do you expect to perform such an operation on Mr. Luehr?

A. I should say it should be done in the very

(Testimony of Harry R. Walker.)

near future, within the next few weeks.

Q. After that operation has been performed—I think the record will show he has had six operations on his leg, is that about right?

A. That is approximately right. Some have been major, some minor, but I think there have been six fairly major procedures performed on him.

Q. Would you then expect this drainage or infection to clear up?

A. We expect it to. It is down so much in quantity that we hope this will clear it up. There is no guarantee it will, [292] but the expectation from the history, his general condition, all indicate this will clear it up.

Q. Is there any name medically for this infection you have been treating in this man's left tibia?

A. Yes. Post-operative osteomyelitis.

Q. What does that word mean?

A. Infection of the bone.

Q. Will you tell us, then, Doctor, to make it clear, if you do clear it up this time with reference to that infection, does that leave Mr. Luehr free forever of any further infection in the tibia?

A. No, unfortunately it does not. We are in much better shape with the osteomyelitis than we expected at first, due to penicillin and the antibiotics, streptomycin, aureomycin, and so forth, the various drugs, but they are prone to flexibility, such that if any injury occurs, a recurrence——

Q. Would he have a period of convalescence?

A. That is right. Once out of the hospital he

(Testimony of Harry R. Walker.)

will be at home. He will be in the office a couple of times a week at first, the first few months, and then one or two times a week over two or three months, and, I don't know, he heals a little slower than the ordinary, normal individual in good health would, you see.

Q. With reference to this back condition and the X-rays you showed the Court—I think that was libelant's Exhibit [293] 33, side view of that compressed first lumbar vertebrae.

A. The originals and the last ones that were taken?

Q. Yes. A. Yes, sir.

Q. With reference to that condition of the first lumbar vertebrae, the one you say is crushed and has been pushed back into the cord space, what if anything is indicated for Mr. Luehr in that regard?

A. Nature has already done half the job. In other words, he has a spontaneous fusion between one and two lumbar.

Q. In the body?

A. In the body, that is right. But it doesn't have a union above. This is still loose. There is no joint left to stabilize the spine and it should be fused. In other words, the joint between 12 and 1 should be fused.

Q. Tell us why you haven't done that so far?

A. His condition has not been sufficiently good to permit it. In other words, you don't like to do any major bone grafting or reconstructive procedure in the face of infection. He still has that infection

(Testimony of Harry B. Walker.)

in his leg and his general condition is not good. The opportune time has not arrived. There has been maximum result from the bone graft.

Q. In reference to talking about the term "bone graft," Doctor, whereabouts would you get the bone to fuse the spine in Mr. Luehr's specific case? [294]

A. Well, you like to take it from the patient himself, because to a limited—you can take it from the right ileum or the pelvis, and you also take some from the leg, the tibia on the right side. That may be enough. It may not be sufficient and he will have to borrow some from the bank, but that does not unite quite as well as your own bone, so we prefer to take it off him if we can.

Q. With reference to that operation you have been talking about, demineralization, and this word osteoporosis. What, if anything, does that have in Mr. Luehr's specific case?

A. You mean as far as bone healing?

Q. With a fusion operation.

A. We would expect a union or complete fusion, bony fusion to form as the result of graft much slower in his case than that of a normal individual in good health. Of course, no individual who is normal would need a spine fusion, but a person in generally good health would heal much quicker than he would. That is the reason for delaying it this way until he has had the maximum result from his reconstructive procedure.

Q. Do you recommend, then, a fusion in Mr. Luehr's case? A. Yes, I do.

(Testimony of Harry B. Walker.)

Q. When would you start that fusion?

A. As soon as we clear up his leg.

Q. If the leg is all cleared up within three months, you [295] would recommend the fusion operation at that time? A. Yes.

Q. The main purpose of the fusion would be what?

A. That is to take the—to stabilize the vertebrae and take the motion out of the spine, the painful motion. In other words, it is a result of fracture, the rough—calcification—the disk spaces are collapsed, collapsed cartilage is destroyed, and we can stabilize it. Nature has tried to stabilize it so that our job is fifty per cent of what it would be ordinarily.

Q. Once fusion is done, you say to stabilize the joint, what will be the net effect on Mr. Luehr?

A. That should do quite a bit, should take quite a bit of pain out of his joints, should prevent further calcification and demineralization, some of which has occurred. I expect it to stiffen his spine, but it will be comfortable and it will be painless. As it is now, he is not comfortable when he gets up. Any weight bearing so the full weight of his body comes on his spine, it hurts, and there is muscle spasm. He is more comfortable on crutches. You can hang him up on his shoulders and his spine straightens out and he feels better—or by his neck.

Q. Will that require hospitalization?

A. Oh, yes.

Q. For how long a period of time? [296]

(Testimony of Harry B. Walker.)

A. Usually two or three weeks if things progress without complication.

Q. At the same rate? A. What?

Q. Same rate, $20 or $25 a day? A. Yes.

Q. How about the operating room services and anesthetist?

A. They run approximately $100 for that type of thing.

Q. What about the surgeon's bill?

A. That would usually run between $400 and $500. Approximately $450.

Q. In this case so far you have been paid by the Firemen's Fund, have you not?

A. I think so, sir.

Q. On what basis, private patient or industrial?

A. On an industrial rate.

Q. Is there any difference in the rates?

A. Considerable.

Q. After the operation has been performed, then would he have any period of convalescence?

A. Yes, he would be practically an invalid. He would be able to go to the toilet and be able to go to his meals, but he would have a cast or brace on for approximately six months, depending on progress of the graft as checked by X-ray and clinical examination. After six months he would [297] be allowed more liberty. Be up and about more, and more motion, and so forth. One year, you can find out if a graft will unite or not. They are, in my hands, approximately 75 per cent successful. Some surgeons report higher results, some less, but I

(Testimony of Harry B. Walker.)

think that is a good average. Approximately 75 to 80 per cent.

Q. At the end of that time, then, insofar as the back and the leg are concerned, would you expect after three months and the year period with reference to the back, his condition with reference to the back and leg would then be on a permanent and stationary basis?

A. Yes, we anticipate that. That is, if we encounter no complications.

Q. You have already testified to the left hip and as to the right ankle. Is there any treatment indicated for the left hip and the right ankle?

A. I know of no procedure that will be required—that will improve it, other than rest and limited activity. In other words, this with these joints is post-traumatic. They won't take much kicking around like prolonged standing, walking, climbing, or any other injury to those members.

Q. At the end of that period of time, taking it to be a year and three months, at the end of fifteen months will Mr. Luehr require any further medical treatment or medical vigilance? [298]

A. Well, that is hard to say. In other words, from time to time he will have—he should be checked by X-ray every six months for the first three or four years. At his age, what they usually do when they come in, if the hip hurts, put on heat or give him physio. He is in and out of a brace, in and out of bed. You just treat him symptomatically. In fact, once the bone is healed you have

(Testimony of Harry B. Walker.)

done all you can do and there will be no measured medical stuff that I can anticipate, but it will be more nuisance value. Maybe major to him, but not to me, other than to make him comfortable.

Q. At the end of this 15 months period of time, again basing your opinion on reasonable medical certainty, with reference to his back and leg, would you expect that man to be able to go do the work of a stevedore, getting on and off of beams, say, seven feet above a deck, carrying sacks, wheeling heavy articles, any work of that sort?

A. No, I would not.

Q. Would you expect him to be able to drive, say, a caterpillar tractor or any type of heavy machinery? A. No, I would not.

Q. Can you give the Court, so that the Court has something here from you, of the percentage of disability you would expect from this man's back even after the fusion has taken place? [299]

A. May I ask a question? What do you mean, comparing? Compare percentage of disability as a stevedore, or——

Q. No. Just if you can give us what disability—I will put it another way: What type of work, if anything, do you think Mr. Luehr will be able to do at the end of this 15-month period?

A. Well, I anticipate, judging from the progress of the case and the severity of the injury, he will never be able to do any heavy manual labor of any type. I should say he is only fit for the most sedentary type of work. I don't think he will be able

(Testimony of Harry B. Walker.)

to walk any distance or stand on his feet any time. I don't think he will be able to carry any loads of 25 or 30 pounds with any degree of comfort. Even if he doesn't do that, he may still be uncomfortable, as I have mentioned.

Q. So that we all understand the significance, Doctor, by "sedentary," what do you mean?

A. I always like to think of sedentary, you sit down. His activity will be restricted activity such as require his brain rather than his physique to carry out his objectives.

Mr. Magana: All right, that is all.

The Court: Any cross-examination?

Mr. Harrison: I have one or two questions.

The Court: Let me make a remark in passing. I never saw this gentleman before. He never testified before here. [300] Have any of you gentlemen contacted this gentleman at any time?

Mr. Kay: I am sorry, I didn't get that.

The Court: Read that, Mr. Reporter.

(The Court's comment was read by the Reporter.)

Mr. Kay: He has never testified for me, your Honor.

The Court: Anybody else?

Mr. Harrison: No, your Honor.

The Court: I can't help—I am always too outspoken, I know. From the standpoint of fairness in doing things expected, I think he did a pretty good job.

(Testimony of Harry B. Walker.)

Mr. Harrison: We all commented on that, at recess, your Honor.

The Court: If that is any comfort to you, I mean every word of it.

The Witness: Thank you very much.

Mr. Harrison: I think we also admire your skill in getting Mr. Luehr in the condition he is in now, Doctor.

Cross-Examination

By Mr. Harrison:

Q. There is one thing bothering me, though. Doctor, since the filing of this libel in this case, we have been anticipating further operations to Mr. Luehr's leg. I would like to ask you, Doctor, has there been any relation to the postponement of the operation to the time of this trial? [301]

A. Indirectly, yes; but directly, no. This guy has gone along and the drainage gets a little less each time. You take the dressing off and one week you have three drops, and the next week you have a spoonful, and he has been getting a little less all the time. The slower the exudate or discharge, the more healing. In other words, it makes your operation much slower all the time, you see, and therefore you put it off just as long as you can, because there is a chance you may stir it up. I know several consultants have seen him and some of them thought I should go ahead and saucerize him.

Q. That is right.

A. But he is much better now than two or three

(Testimony of Harry B. Walker.)

months ago, general condition and everything. But he is about stabilized now. For the last six or seven weeks it has been about the same, three or four drops each time you change dressing.

The Court: I am amazed how he kept his weight under the conditions.

A. He has gained weight in the last six months considerably. He has perked up considerably the last six months, your Honor, since we got him up.

Q. (By Mr. Harrison): Did he at any time specifically request that you if possible delay the operation on his leg until after the trial? [302]

A. No, Frank never has. He has left the whole thing up to me.

Q. Did Mr. Resner? A. No.

Q. No one ever suggested that to you?

A. No. He has told me the trial was coming up.

Q. Yes. You said indirectly it did have a relation? A. That is what I am talking about.

Q. You took it upon yourself to delay it?

A. Yes. Wouldn't make any difference, a few weeks. As a matter of fact, he is a little better off, and he explained to me he would rather be here.

Mr. Harrison: I believe that is all I have, Doctor. Thank you very much.

The Court: Any questions?

Mr. Kay: No questions.

Mr. Cooper: I would like to ask a couple of questions, probably for my own edification. [303]

(Testimony of Harry B. Walker.)

Cross-Examination

By Mr. Cooper:

Q. Doctor, in the course of your direct, you made mention of a heavy protein diet, if I am not mistaken, as having a beneficial effect on the functioning of the body and to heal wounds?

A. Yes, sir.

The Court: Don't you listen to Lindlahr over the radio on that?

Mr. Cooper: Fortunately Lindlahr doesn't suit my hours.

The Court: Have you ever heard of Lindlahr?

The Witness: Yes, sir, I have.

The Court: He encourages that sort of thing himself. Is that what you had in mind, Mr. Cooper?

Mr. Cooper: Didn't have in mind Lindlahr, if that is what you mean.

The Court: All right, proceed.

Q. (By Mr. Cooper): Doctor, did you prescribe a protein diet of any sort to assist in healing?

A. Yes, we tried everything in the world with him. He was unable to eat or digest anything, and we had a very tough time getting him—we had to feed him by vein most of the time.

Q. Is he presently on a heavy protein diet?

A. He is presently on a pretty good diet, I don't know what diet he is on. [304]

Q. Are you prescribing any diet?

A. No, sir, I am not. I prescribed a good general diet, high protein, mineral, just a well-rounded diet.

(Testimony of Harry B. Walker.)

I am not so much in favor of special diets, as long as he has a well-balanced diet.

Q. Doctor, the Navy—I mean, Doctor, the Navy experimented with men wounded during the last war and they found a diet, for example, like good steaks, was the best sort of diet that a Navy man can get to recover.

A. That always makes for mental health a little bit, but we have found out that the Wilbur diet, which consists of eggs and cream, milk, concentrated protein products, predigested proteins mixed up, a horrible concoction, which tastes lousy, was the best thing to get them back on their feet, more so than the steak, were synthesized, used by the body.

Q. A steak diet is just emotional?

A. No, steaks are good, sure; affects my emotions certainly.

Q. Just the mere mention of them.

Mr. Resner: When did you have your last steak? Probably last night.

Mr. Cooper: I don't remember.

The Court: You can't remember.

Mr. Cooper: No, steaks are kind of scarce.

The Court: I am much the same way.

Q. (By Mr. Cooper): Ask you one other question along this [305] line, Doctor, that is, you mentioned milk, I believe, in that concoction that you referred to. Is it beneficial to have a heavy milk diet in order to supply lime?

A. You mean the calcium?

Q. Yes.

(Testimony of Harry B. Walker.)

A. Well, you got to have a sufficient amount, but we have never been able to prove that giving calcium tablets, excessive milk really benefited any more than a normal diet intake, say, of one quart of milk a day. All it does is blow you up and fill you full of gas.

Q. A considerable quantity.

A. By using predigested proteins will give us the same amount of calcium, and give us that much more in an ounce, and it is much easier.

Q. To be sure I understood your testimony correctly, the major damage to this unfortunate man was done by, caused by the downward crushing blow, is that correct?

A. I would think so, yes, sir.

Mr. Cooper: That is all.

The Court: Any other questions, gentlemen?

Cross-Examination

By Mr. Kay:

Q. That includes the fracture of the right ankle, too, is that right?

A. Yes, that is when you usually get these normal weight-bearing fractures, whenever you have a blow on the head you are [306] likely to get a fracture like that.

Q. That means all his injuries he received——

A. Will tend to——

Q. ——this history of injury that he got?

A. I interpret them as such.

(Testimony of Harry B. Walker.)

Recross-Examination

By Mr. Harrison:

Q. What about the fracture of the leg, you think that was done by the fact that the leg was, according to what we have heard here and what is in the record, the leg was laid out on a beam and then pinned down, or was that caused by his being hit on the shoulder and his whole body?

Mr. Resner: Talking about the right or the left leg?

Mr. Harrison: Talking about the left leg.

A. It could be caused either way. In other words, obviously the left leg received some type of blow the right one didn't; the right one didn't break the same way.

Mr. Harrison: Thank you.

Mr. Magana: That is all. May the Doctor be excused?

The Court: No, I am going to take the Doctor in my chambers.

We will take an adjourment until 10 o'clock tomorrow morning.

Mr. Harrison: Your Honor, please, there is one question which I overlooked asking Mr. Luehr when he was on the stand which I think will be necessary to the record. [307]

Mr. Resner: Why not ask him in the morning?

Mr. Harrison: I was anticipating perhaps Mr. Luehr won't be here.

Mr. Resner: He will be here.

Mr. Harrison: I was going to say I wanted to ask——

The Court: It will do him good, the effort in coming here.

Mr. Harrison: I wanted to ask him before the libelant rested.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Thursday, March 20, 1952.) [308]

March 20, 1952, 10:30 o'Clock A.M.

The Clerk: Luehr vs. United States, et al., further trial.

Mr. Resner: Ready.

Mr. Harrison: Ready.

Mr. Kay: Ready.

The Court: I intended to call to your attention last evening I had to go to a funeral this morning. That is the reason for my absence. Proceed.

Mr. Resner: The libelant rests, your Honor.

Mr. Harrison: In that event I have my doctor here, so I would like to have the doctor testify.

Mr. Kay: Your Honor, so that we may facilitate this case, I wonder if Mr. Harrison could give us some idea about the length of time his case would take?

Mr. Harrison: At present, your Honor, I would be hesitant to do so. I have several subpoenas out which the marshal has advised me he is having difficulty serving.

Mr. Kay: Assuming——

Mr. Harrison: Assuming they are served, I would estimate the best I could do would be to finish by Friday—tomorrow afternoon between 3 and 4.

The Court: That will give you full opportunity, then, to prepare the following Monday. [309]

Mr. Kay: Yes, your Honor.

Mr. Harrison: Doctor Haldeman.

KEENE O. HALDEMAN

called as a witness for the Respondent United States of America, being first duly sworn, testified as follows:

The Clerk: State your full name to the court.

A. Keene O. Haldeman.

Direct Examination

By Mr. Harrison:

Q. What is your occupation, Doctor?

A. I am a physician and surgeon specializing in orthopedic surgery.

Q. What does that specialty consist of, Doctor?

A. Consists of diagnosis and treatment of diseases and injuries of the bones, joints and muscles.

Q. And how long have you been in this specialty, Doctor? A. I have specialized since 1929.

Mr. Harrison: If the Court please, I believe your Honor is familiar with Dr. Haldeman's qualifications, and perhaps all of counsel are familiar. It

(Testimony of Keene O. Haldeman.)

might save time, or would you prefer I go into his education?

Mr. Magana: I will stipulate he is an orthopedist and qualified, if your Honor please.

Mr. Harrison: Thank you.

Q. (By Mr. Harrison): Dr. Haldeman, did you, at my request, [310] examine a man named Frank Luehr on or about November 26th, 1951?

A. I did.

Q. That was some 12 or 13 weeks ago, is that correct? A. It was.

Q. With the aid of your notes, Doctor, could you summarize your findings for us?

A. The complaints which the patient made when I saw him on November 26th, 1951, included: First, a constant pain over the lower lumbar spine and around the lateral aspect of both hips, which pain was said to be worse in damp weather. Second, a draining sinus over the left tibia. Third, a shortening of the left leg. Fourth, limitation of motion of the left knee. Fifth, limitation of the left ankle. And, sixth, pain in the left ankle on walking.

My examination, in addition to a general physical examination, included those areas which were said to have been injured. From the history it appeared he had sustained a fracture of the left clavicle. Examination of the left clavicle was entirely negative except for a moderate tenderness over the upper border of the clavicle at its mid point.

Q. Excuse me, Doctor. The clavicle being the shoulder bone, is that correct?

(Testimony of Keene O. Haldeman.)

A. The collar bone.

Q. The collar bone? [311]

A. Examination of the left shoulder showed a normal range of motion in all directions except for a very slight limitation of abduction. That is, raising the arm from the side. This limitation was barely perceptible and measured at ten degrees.

The patient gave a history of fractures of the ribs, which diagnosis was confirmed by a review of X-ray films which I saw, which films indicated that the ribs had fully united. Physical examination of the ribs was entirely negative, there being no tenderness or pressure on pressure, and no pain in deep breathing, and the chest expanded normally without pain.

Examination was directed to the left leg. The patient walked with a cane, bearing partial weight on the left leg. There was a depressed scar four and one-half inches long over the anterior medial aspect of the upper third of the tibia. There was evidence of slight drainage of the lower two inches of this scar, which along this two inches was not fully healed. No bone could be seen in the unhealed portion of the scar.

The Court: Pardon me. What was the date of this examination?

A. November 26th.

Mr. Harrison: That was thirteen weeks ago, your Honor.

A. (Continuing): There were two scars on medial and lateral [312] aspects of the leg which

(Testimony of Keene O. Haldeman.)

had fully healed and represented incisions made to permit closure. There was no paralysis and no loss of sensation.

The fracture of the tibia appeared to be firmly united on testing.

There was no instability of the knee. That is, the ligaments of the knee appeared to be sound. There was slight tenderness over the middle of the tibia.

Measurements were made of the two legs to determine difference. The left leg was three-fourths of an inch shorter than the right. Measuring the circumference of the thigh showed the left thigh was one-half inch less in circumference than the right, and the left calf one-fourth of an inch less in circumference than the right.

Measurements of the knee motion showed normal extension on both sides. The right knee had normal flexion to an angle of 45 degrees, and the left had a slight limitation of motion, flexing to eighty degrees. The total range of motion was 135 degrees on the right and 100 degrees on the left.

Testing ankle motion showed five degrees limitation of dorsi flexion, carrying the ankle upward, and ten degrees limitation of plantar flexion. Total limitation of the left ankle was forty degrees as compared with a normal of fifty-five on the right. The motion of the joint beneath the ankle, pushing the foot from side to side, on the left, injured [313] side, estimated to be 20 degrees and on the right side 30 degrees.

(Testimony of Keene O. Haldeman.)

Attention was then directed to the back. He did not wear any support. The posture was poor, with increased dorsal kyphosis, which is a rounding of the spine, and the patient leaned slightly to the left. We call it a lift to the left. The left shoulder was elevated one-half inch and the right hip bone was elevated about three-quarters of an inch.

Testing forward bending of the spine showed about two-thirds of normal range of motion and brought the fingers twelve and one-half inches from the floor, with a complaint on the patient's part of pain in the lumbar region. Bending back was estimated to be one-third normal, with complaint of pain in the lumbar region. Bending to the right, three-fourths normal and painless, and bending left was two-thirds normal with complaint of pain in the right lumbar region. Rotation of spine to either side was three-fourths normal and said to be painless.

There was moderate tenderness over the third lumbar vertebrae, that is, in the middle of the lumbar region. There was no spasm in the back muscles, and no disturbance of sensation.

Neck flexion, that is, bringing the chin down to the sternum forcibly, was negative. [314]

The Court: Pardon me. Did you have the benefit of X-ray pictures?

A. I have had a complete series of X-rays, yes, I did, your Honor.

The Court: All right.

(Testimony of Keene O. Haldeman.)

A. (Continuing): Neck flexion test was negative.

In cases of recent fracture of the spine, an unhealed fracture usually brings about pain at the level of the fracture. Straight leg raising could be carried through fifty degrees on either side, with complaint of pain in the lower back. That is, some limitation of straight leg raising. The crossed leg test, which is an evidence of low back derangement, was negative on both sides, and consisted of placing the one ankle on the other knee. The reflexes show knee jerks and ankle jerks were normal.

I reviewed X-ray films, as you asked, your Honor, which had been taken October 30th, 1951, at the United States Marine Hospital. Do you wish a description of such films?

Mr. Harrison: If you wish, your Honor, I have the films here if you would like to use the box. We can go over them, if your Honor likes. I think we saw quite a few yesterday.

The Court: The reason I was making the inqury in relation to them, we had them here yesterday and I wanted to know if he had the benefit of examining those, that is [315] all.

A. I probably did not see the original films, but I saw the ones taken just before my examination, which showed the end result of the various injuries.

The Court: All right.

A. It is probably not necessary to describe those films in detail if they have been presented.

Mr. Harrison: No, I don't think so.

(Testimony of Keene O. Haldeman.)

A. My conclusions with regard to the patient were that he had sustained the following injuries: First, a fracture of the left clavicle, which had fully united without any resulting disability except for the very slight limitation of abduction of the left shoulder.

There was a history of contusions of the right leg, which had fully healed and of which there is no evidence at this time.

He sustained fractures of several ribs on the left and of at least one rib on the right, so far as I could determine from the recent X-rays, but it was evident all those fractures had healed, both by physical examination and X-ray films, and he has no complaint with regard to those ribs.

He also sustained a moderately severe compound fracture of the first lumbar vertebra, and the anterior height was diminished by 50 per cent. This vertebrae, the fracture of this vertebrae has fully healed. There is a solid bridge of [316] bone between the first lumbar vertebra and the one immediately below it on the anterior surface, which bridge of bone has doubtless formed as a result of the fracture and which tends to immobilize that fractured vertebra.

He sustained a compound fracture of the left tibia and fracture of the left fibula. The fracture of the left fibula did not unite, but that has no present importance because it was in the upper third where the tibia has united, but there has been a persisting

(Testimony of Keene O. Haldeman.)

sinus which, when I saw him, was only draining very slightly, and which drainage may be persisting because of a tiny piece of dead bone, the presence of which was suggested in the recent X-ray films.

The factor of disability which I found with regard to the left leg included the three-fourths inch shortening, which will be permanent; the relatively slight atrophy of the left thigh and calf, which atrophy I would expect to improve with continuing use; a limitation of motion with regard to the flexion of the left knee, which I would classify as of a slight degree, and which should improve with further use, although there may be a slight permanent limitation of flexion of the left knee; a slight to moderate limitation of motion of the left ankle, which I would also expect to improve somewhat with use; and a slight limitation of the subastragaloid [317] joint which is a joint of the foot, and which may also improve.

With regard to the back, he has certain limitations of spinal motion which I would expect to be permanent. I have listed the limitations of motion which I found and which may show some improvement, although some permanent limitation of spinal motion is to be anticipated.

The complaint of pain in the back I would expect to improve with continued bridging of the vertebrae and with passage of time.

The question of spinal fusion is to be considered. It is not my practice, as a rule, to fuse a fractured spine, because they usually go on through a steady

(Testimony of Keene O. Haldeman.)

course of improvement to a satisfactory function. Some people do fuse a fractured spine, which procedure may result in disappearance of pain.

Q. Doctor, you mentioned a three-fourths inch shortening of the left leg. Can that be corrected by some means such as an elevated shoe or heel?

A. Three-fourths inch shortening of the left leg isn't sufficient degree that one would carry out any operative procedure to equalize the leg. The shortening can be readily compensated to a sufficient degree by raising the left heel one-half inch and raising the sole of the left shoe one-fourth inch. Such a modification of the shoe is hardly visible to anyone [318] and would result in equalization of all but one-fourth inch in the shortening, and there is no disability from a shortening of one-fourth inch.

Q. Do you believe such a procedure would alleviate the pain in the back at all, Doctor?

A. I think that it might have some effect in relieving the back pain. A difference in leg length of three-fourths of an inch alone may be productive of low back pain; and a part of that low back pain, particularly the pain that is at a lower level than the fracture, may be due to the inequality of the leg length.

Q. Doctor, the patient in his testimony here has complained of pain in the region of his left hip. Was any such complaint made to you at the time of your examination?

A. No such complaint was listed or made to me. I will have to modify that. The fact is that he did

(Testimony of Keene O. Haldeman.)

complain of a constant pain in the lower lumbar spine and in the lateral aspects of both hips.

The Court: Pardon me, will you repeat that, Doctor?

A. He complained of constant pain over the lower lumbar spine and around the lateral aspects of both hips. That complaint of radiation of pain to the lateral aspects of both hips is a common accompaniment in low back pain, and I attribute it to low back derangement rather than to any direct disturbance in the hip joint itself. [319]

Q. (By Mr. Harrison): I see. Then, Doctor, other than the disability that arises from this leg and the back condition, is there any physical evidence that this man is not completely recovered from the other fractures which he sustained, such as the ribs and clavicle?

A. There is no such evidence.

Q. Would it be reasonable to assume that this man will be eventually able to dispose of his pain and walk about without too great difficulty?

A. I would think so.

Q. And do you think the man's injuries will prohibit him from doing some semi-sedentary work, or do you think he can make a useful citizen of himself?

A. I should think he can eventually perform many types of work. Possibly not that of his former occupation as a longshoreman.

Q. Do you think he could do the work of, say, a watchman or a guard, or something of the sort?

(Testimony of Keene O. Haldeman.)

A. I should think so.

Q. A gatekeeper? A. Eventually.

Q. Do you think he could safely travel to and from a job? A. He could.

Q. You say "eventually," Doctor. How long would you estimate this recovery is going to [320] take?

A. When I saw him on November 26th, 1951, I thought that he would be able to engage in some type of work within a period of three to six months. That conclusion was based on the assumption that an operation was soon to be performed to eliminate the drainage from the leg.

Q. And did you at the time you examined him, would you have recommended that that operation be performed at that time?

A. I felt that another operation should be performed to eliminate the drainage from the leg, and that there was no reason for delaying the operation further.

Q. I see. Doctor, if I understand that, you probably would not recommend a back fusion. Do you think that in the normal course of affairs, nature taking care of him, his back pain will be considerably reduced and possibly completely relieved?

A. I would expect a progressive improvement in the back pain, and it may be entirely relieved by time.

Mr. Harrison: Thank you, Doctor. I think that is all I have.

(Testimony of Keene O. Haldeman.)

Cross-Examination

By Mr. Magana:

Q. Doctor, in connection with the examination that you conducted of this man, I want to make certain things clear for the record, please. First, you saw him only the one time, did you not?

A. That is true. [321]

Q. All right. Now, that examination was what you medical men would classify as a complete orthopedic examination of the man, is that right?

A. It was.

Q. Second, in connection with your work, and again just to make it clear, you do not hold yourself out as a neurosurgeon nor as a neurologist, do you, sir? A. I do not.

Q. All right. Then coming down to a few of the specific things in this case, let me understand you: One, there is a definite three-inch shortening of the left leg as compared with the right leg?

A. A definite three-fourths inch.

Q. Excuse me, of course, three-fourths of an inch shortening, is that right?

A. That is correct.

Q. That shortening that is present between the two lower extremities is accountable entirely, is it not, because of the impaction of the proximal end of the tibia with the distal end, is that correct?

A. We can assume that it is, although it is a known fact that normal men will frequently show variation of leg length of one-fourth to one-half

(Testimony of Keene O. Haldeman.)

inch. But assuming that he had equal length before, it would be due to the loss of some bone substance and the impaction of the fragments. [322]

Q. All right. Now, in addition to that, in measuring the man's legs—and by legs, I am going to use the entire lower extremity as such—you can also determine whether or not that individual carries the crest of his ileum at a higher level than the opposing side, can you not? A. You can.

Q. In this man's case, he does carry the crest of his right ileum, this hip bone, higher than he does the left, does he not?

A. I observed that the crest of the ileum was three-fourths of an inch higher than the crest of the left ileum.

Q. Does that also add in any way to the shortening or to the tilt that this individual has upon an observation?

A. It does not add to the shortening, it is a part of the shortening, because the length of the leg determines the height of the iliac crest.

Q. I see.

A. They co-exist, but one is not added to the other in determining the total shortening.

Q. All right. With reference to the question of this lumbar spine, as I understood it, you checked the records or the X-rays that the Public Health Service had submitted to you for examination, is that right? A. I did.

Q. That first lumbar spine, if I remember your

(Testimony of Keene O. Haldeman.)

testimony, was [323] crushed to about fifty per cent of its normal height, is that correct?

A. That was the compression of the anterior border of the vertebrae. It is a wedge-type of compression so that the anterior border was compressed fifty per cent. The superior border was compressed very little.

Q. All right. Was there anything else of significance with reference to that fracture that you observed?

A. My other observation was that a bridging bone extended from the first lumbar to the second lumbar, anteriorally.

Q. Now, if I may, Doctor, just diagramatically for the moment, using just a block (drawing diagram on blackboard), in speaking of this vertebrae we are going to speak exclusively of the vertebral part, as such, without a laminae or the spinous process. You understand what I am saying?

A. I understand.

Q. Fine. Now, if we take, then, the first lumbar vertebrae and compare it with both the vertebrae above—I am going to call the upper one 12, the middle one 1, and the one below 2—that would represent the three vertebrae I have shown.

A. It would. [324]

Q. Assuming for the moment that this is a side view that we are looking at, a lateral projection rather than a front to a back view, and assuming that the word "F" represents the front or anterior portion. The spinal canal, of course runs behind

(Testimony of Keene O. Haldeman.)

these vertebral bodies, does it not? A. It does.

Q. All right. I am going to let that be represented by a couple of lines with the word "B" in back of it, and the spinus process just represented here by a couple of pseudo parallel lines behind it. As I understand it, the front of this vertebral body, as you remember it, was wedged down to about 50 per cent; right? A. That is right.

Q. The back of that vertebral body was approximately the same height as the corresponding body above and below?

A. That is probably true. Sometimes a little compression occurs of the posterior portion, and I cannot say with certainty in this case.

Q. All right. Whatever it is then, was this compression a compression, Doctor, that took place down, and by down I mean towards the level of the second lumbar, or was it a compression that took place more or less equally from the superior margin down as well as from the inferior margin up?

A. I do not recall.

Q. All right. Whatever it was, then and just arbitrarily [325] cutting this in half with a dotted line, I am generally diagrammatically showing with reference to the compression what you observed, is that correct? A. That is correct.

Q. All right. Now, in addition to that the other observation that you made from the X-ray was that at the time you saw these X-rays, which I believe were taken in October of 1951, there was evidence

(Testimony of Keene O. Haldeman.)

of bony bridging in the anterior margin between L-1 and L-2? A. That is true.

Q. All right. Now then insofar as general pathology and by pathology I am referring to bone pathology, of the first lumbar vertebra is concerned, have I indicated the important things that you observed on the radiographs?

A. You have actually—there is some disproportion in the sizes of the first and second lumbar vertabrae as you have drawn them, but I do not know that that is significant.

Q. No, it isn't intentional, it is just that I am not good at still life, Doctor. There we are now. I understood you to say that this vertebral body and what it represented on the X-ray would represent a moderately severe compression fracture, am I correct?

A. That would be my classification.

Q. All right. If then we go further, the fusion that has taken place between L-1 and L-2 is a desirable fusion, is it [326] not? A. It is.

Q. And that's one of the main reasons why you, as a preference or following your choice of procedure, would not recomend a spinal fusion operation at this time; is that correct?

A. It is one of the reasons. I believe that the main reason is based upon experience of myself and of others that the patient does about as well without the fusion.

Q. All right. Insofar, then, as this fracture is concerned, the fracture as you see it there is not

(Testimony of Keene O. Haldeman.)

affecting either the spinal cord or the nerve roots as they come from the spinal cord, is that correct?

A. That is my belief on the basis of the patient's symptoms, and on the basis of my physical findings.

Q. All right. Now, there is, of course, medically an entity which you medical men recognize called a spinal cord concussion, is there not?

A. There is such a condition.

Q. That concussion, however, has changes which are reversible so that even if you manifest a pathology originally you may recover from it, like you do from a concussion of the brain; generally is that so?

A. Theoretically that is possible; practically it isn't subject to proof, because you would have to take a piece of spinal cord out at the time of injury, which no one has done, [327] so that it is only theoretical when we talk about that.

Q. Fine; thank you. Then let us use the other word—there is an entity with reference to central nervous system involvement which is called a contusion, is that correct?

A. A contusion in reference to anything means a bruising.

Q. Yes. And if you start with the assumption that there has been a contusion, then if there is a bruising of the cord itself, the changes or the damage that is done is not reversible, is that correct?

A. You mean that healing cannot take place?

Q. No, even though healing may take place whatever scar tissue has formed on the cord will remain

(Testimony of Keene O. Haldeman.)

there if there has been a contusion; is that so?

A. If scar tissue has formed in the cord it will presumably remain there. The only fallacy about the whole argument at this point is that the spinal cord ends at the lower borders of the twelfth dorsal vertebra, usually, and below that it is a group of nerves referred to as the cauda equina. The spinal cord does not extend quite as far as the level of the fracture.

Q. Well, Doctor, as long as we are on that point, anatomically, according to Gray's Anatomy, or any anatomy book that we care to take, the spinal cord generally ends between L-1 and L-2, does it not?

A. That is not my impression. I believe that it ends about [328] the—between the 12th thoracic and the first lumbar. There is a variation in individuals. Beyond that termination it is continued as nerve—nerves.

Q. What you call the cauda equina, but in order to ascertain this proposition, whether it ends between L-1 and L-2, or at the 12th thoracic, we can go to any anatomy book and get the general concensus, can we not? A. We can.

Q. I have one here, I will refer to it in just a moment. In reference to this fracture then of the first lumbar vertebra, if the vertebral body itself is damaged and is displaced into the spinal canal, into the space occupied by the spinal canal as such, then of course that adds another factor into the pathology in this case, does it not?

A. If it is displaced into the spinal canal at the

(Testimony of Keene O. Haldeman.)

time of injury, one would anticipate evidence of nerve lesion, such as paralysis below that level, loss of rectal and bladder control, and loss of sensation. So far as I know, those evidences of spinal cord injury were not present.

Q. All right. Now, doctor, you mentioned something about the spinal cord ending at a certain level. Even if—let us take a vertebra where there is no question about it, let us take the third lumbar vertebra. Even if the third lumbar vertebra were to protrude back into the canal and impinge upon the cauda equina, he could still get the symptoms of cord [329] paralysis that you have just described, could he not?

A. You can get these various paralyses from an injury to the cauda equina.

Q. All right. Now, that is because that is still part of the central nervous system, isn't that so?

A. It is.

Q. Now, in this case on the examination of the X-rays that you had before, Doctor, did you observe whether or not there was any displacement into the spinal canal?

A. That I can only answer by looking at those particular X-rays.

Q. Well, before I show you that let us go this far. If there has been—one centimeter is two-fifths of an inch? A. Approximately.

Q. If there has been a displacement of two-fifths of an inch to one-half inch into the spinal canal, that is a marked displacement, is it not?

(Testimony of Keene O. Haldeman.)

A. That depends on the level at which the displacement occurs and the total width of the canal at that level. I mean, it isn't measured in terms of centimeters, but measured in terms of proportion of the canal which is narrowed.

Q. All right. Whatever it is, if there has been a displacement of two-fifths to one-half inch into the spinal canal at the level of L-1, just below T-12, below the twelfth [330] thoracic, you would observe, looking at the X-ray you would say that there has been a definite displacement into the place where the spinal canal should be, would you not?

A. There has been—there would, in that case, be a displacement into the spinal canal. I should point out that there is ample room in the spinal canal for the passage of nerves and even of the spinal cord.

Whether or not compression of those structures occur would be determined by clinical manifestations, such as paralysis, loss of sensation and loss of bladder and rectal control. It isn't a question of looking at a space and saying is that cord compressed, it is a question of what is the clinical evidence of compression.

Q. Let us go at it step by step. One, if you look at an X-ray, you can make the observation whether it is displaced or not, at least from the X-ray point of view, can't you?

A. When you say "it" referring to the vertebra?

Q. The vertebra. A. You can, yes.

Q. You can say it is displaced posterially if it

(Testimony of Keene O. Haldeman.)

is, or if it shows upon the lateral X-ray?

A. You can.

Q. All right. Number two, if you want to determine whether a person has had cord symptoms or not, and you are in the position of the examining doctor, examining the one time, you [331] can by reference to the hospital records determine whether or not the individual had, one, sphincter paralysis; two, incontinence of the bladder; three, paralyses of the lower extremities; can you not?

A. Those facts should appear in the hospital records.

Q. All right. If they do appear in the hospital records, and if the treating doctor observes those things in the hospital records, then you again, relying on the history in order to make a diagnosis would then say that there has been at least some pressure on the cord; is that correct?

A. In the event those findings were present there would be evidence of either contusion, which you mentioned, or the appearance of edema, which is an increase in fluid in the cord and nerves resulting from the injury, there would be assumed to be some temporary damage of the nerve tracts.

Q. All right. Now, Doctor I want you, if you will——

The Court: We will take a recess now and give you an opportunity to examine them.

(Short recess.)

Mr. Magana: Your Honor, I would like to mark in evidence as libelant's next in order a lateral view

(Testimony of Keene O. Haldeman.)

that Dr. Haldeman was kind enough to provide.

Mr. Harrison: No objection, your Honor. That was taken at the United States Marine Hospital.

The Clerk: Libelant's Exhibit 37 admitted and filed [332] in evidence.

(Thereupon the X-ray above referred to was marked Libelant's Exhibit No. 37 and received in evidence.)

Q. (By Mr. Magana): Before we show this particular exhibit to the Court, Doctor, obviously Mr. Luehr neglected to tell you about any cord symptoms that he may have had, did he not?

A. He did.

Q. Otherwise—and usually when they have these things, you expect, as an examining physician, to have them tell you about what they have gone through so that you can put it down, on a record, isn't that so? A. That is true.

Q. All right. Now, if I may, I will turn this around there, and would you put this in the box for the Court?

The Court: Exhibit what?

Mr. Magana: Libelant's Exhibit No. 37, your Honor.

Q. Now, we are, of course, looking at a lateral view, are we not? A. We are.

Q. And just for the record so there is no mistake about this, the anterior bridging that you speak about is demonstrated here where I am pointing with a pen; correct? A. It is.

(Testimony of Keene O. Haldeman.)

Q. There is no bridging, however, that you observe at the posterior margins of the vertebral body, is there? [333] A. There is not.

Q. And can you tell by looking at this picture whether the articular facets, if any, have been damaged?

A. Although one cannot see the articular facets at this level, because of the plane in which they lie, I would expect some damage from that type of displacement.

Q. All right. Now, in addition to what had previously been described, Doctor, there is no question whatsoever but that there has been a definite displacement into the spinal canal of the posterior body of the vertebra? A. That is true.

Q. All right. Now, let me ask you, the picture that is demonstrated there—incidentally, the first lumbar vertebra is one of the vertebral bodies that is commonly compressed in an accident, is it not?

A. It is.

Q. And that is because that is the place where there is the greatest amount of flexion or movement in the spine other than at the neck, is that so?

A. It occurs at that level because it is the junction of the movable part of the spine, which is the lumbar, with the relatively immovable part of the spine, which is the dorsal.

Q. Fine. Now, in this particular film, Doctor, I want to show you a front to back view here, this front to back view was taken the day of the acci-

(Testimony of Keene O. Haldeman.)

dent, July 28 of 1950, and is [334] Libelant's Exhibit 3-I. Would you put it in the box?

There is no difficulty, of course, locating L-1 in that view, is there?

A. It is readily seen because it is the first vertebra below the ribs.

Q. All right. Now, I want you—I am going to call your attention to what appears to be a portion of decreased density, a black portion in there; what is that, Doctor?

A. It is probably a fracture of a lamina of the first lumbar vertebra.

Q. Now, so that there is no question about it being a fracture of the lamina, let me show you Libelant's Exhibit 30, which is taken on March 15 of this year, Doctor.

A. The line formerly seen in this area, (indicating) is no longer visible.

Q. All right. So if we then, Doctor, using this example, which is just an ordinary skeleton, and using it as an illustration, we know that the front body of this vertebra was crushed; that is observable, is it not? A. It is.

Q. We also know that between the first lumbar and second lumbar over the months since the accident there has been a fusion, a connection between the two vertebrae; right? A. There has.

Q. We also know that the lamina in this accident was [335] fractured. Would you show the Court and point to the lamina?

(Testimony of Keene O. Haldeman.)

A. The lamina is this portion of the vertebral body.

Q. All right. And this gives us a pretty general idea as we look at it closely, of what the skeletal spinal canal or a neuroarch looks like, is that correct? A. It does.

Q. All right. Would you be seated, then, Doctor?

Now, with reference to any injury to the back, forgetting for a moment any injury to the central nervous system as such, the cauda equina or the brain, there is also in any back case where there are complaints of pain, possibilities of damage to the nerve roots, or what you men call the peripheral nerves, is that correct? A. It is.

Q. Now, with reference to these nerves or the peripheral nerves, let us take the level at L-1, the first lumbar vertebra. One of the first signs, neurological signs, of damage or of injury to a root is pain at the particular level, is that correct?

A. Pain occurs at the level of fracture probably not due to nerve root involvement, but to actual damage to the vertebra and joints at that level. Pain is certainly a common accompaniment of any fracture of the spine.

Q. All right. If this fracture, while we are on this, if this fracture was sufficient to compress the vertebra, to force [336] it back and to break the lamina at the place where you have indicated, can you tell us, Doctor, whether or not it is reasonably certain to damage the ligaments, like the ligamentum flavum that line the neuro canal?

(Testimony of Keene O. Haldeman.)

A. I should think at least the posterior longitudinal ligament would be damaged.

Q. All right.

A. Not necessarily the ligamentum flavum, which is the posterior side of that canal.

Q. All right. As far as a ligament is concerned, if a ligament is damaged it may calcify over a period of time, is that correct? A. That is true.

Q. And in connection with any of these injuries there is an entity known as traumatic arthritis, is there not?

A. There is such a term about which a great deal of discussion has been carried out.

Q. Whatever it is, as these bony spurs form or as the calcium settles on ligaments, that may produce an area of irritation, is that correct?

A. That is true.

Q. Now, with reference then to this man's spine I notice by your testimony that you have never indicated previously that there was a posterior displacement of the vertebra. Didn't you think that was of importance, Doctor, or was it an [337] oversight?

A. It was an unintentional omission of the description.

Q. Of course. However, a parallel displacement would be certainly more significant than if there had been compression without posterior displacement; right?

A. It would be more significant in explaining the symptoms and physical findings immediately

(Testimony of Keene O. Haldeman.)

after the injury. I am not sure that it has any present significance with regard to present complaints.

Q. All right. As far as the vertebral bodies are concerned, each vertebra does move on the facets, does it not? A. It does.

Q. Now, you, at the present time, do you know whether any fusion has taken place at the facets between L-1 and L-2, do you? A. I do not.

Q. All right. Then will you tell us this, Doctor: Isn't it a fact that between each of these vertebral bodies there is of course, a thing commonly referred to as a disc, is that so? A. That is true.

Q. With damage of the severity that you observed on the first lumbar vertebra, can you tell us whether or not in your opinion it is reasonably certain that there has been damage to the cartilage surrounding the disc at the level between L-1 and T-12 and L-1 and L-2? [338]

A. I would assume that some changes have resulted in the fibral cartilaginous ring of the disc.

Q. All right. Now, it is true, is it not, that a disc may protrude over a period of time sufficiently to impinge or to press upon the cord itself, is that right?

A. That is a general statement of fact. In this particular case I believe there is good reason, from the lateral view, to assume that the disc cannot protrude laterally—cannot protrude posterially because of the position of that displaced first lumbar vertebra. I could illustrate by showing you on the lateral view what I mean.

(Testimony of Keene O. Haldeman.)

Q. Let me put it to you this way: You mean because it has wedged back into the canal?

A. It has wedged back and overhangs a little where the disc is so that is one thing that I do not think is apt to occur in this man.

Q. Although we have at the present time presently and existing bone in the space where previously there were the coverings and the ligaments for the spinal cord; right?

A. Bone has projected, namely, the first lumbar vertebra back into the space of the spinal canal, a part of which space is occupied by the lower end of the spinal cord and the nerves attached thereto.

Q. All right. I will make it fast, Doctor, so that I won't hold you. Let me just put one other thing up to you. It, the [339] lumbo-sacral—put it another way.

This man is complaining of radiation of pain down the back, the posterior aspect of the left thigh. That is a classical sciatic distribution of pain, isn't it?

A. Well, in the case, in his complaint to me he said it went down his lateral aspect of both hips, and it isn't—not applies to sciatic in that he did not complain of radiation down the leg as far as the knee or calf. Usually sciatic goes clear down the leg, even into the foot.

Q. Doctor, whatever it is, the nerve——

A. It is some nerve.

Q. Well, the nerve that goes down the back of

(Testimony of Keene O. Haldeman.)

the leg as far as the back of the knee is a portion of the sciatic nerve, is that right?

A. The sciatic nerve does go down there, yes.

Q. And that sciatic nerve, among other places, emanates from the lumbo-sacral joint, is that true?

A. That is true.

Q. Now, as far as the lumbo-sacral joint is concerned, Doctor, I don't imagine you had pictures taken, did you or did you not observe any pictures of it?

A. It is shown in the lateral view of the lumbar spine, which was reviewed.

Q. Okay. As I say, I am trying to hurry this so I won't delay you. [340]

I am going to put Libelant's Exhibit 29 in the box. There is no question but that the posterior section of the lumbo-sacral joint is markedly narrowed, is that correct? A. That is true.

Q. All right. Now, Doctor, in connection with your examination I understood you to say that the ununited fracture of the fibula at the upper end was of little significance because it is not weight-bearing; am I correct? A. That is correct.

Q. However, if there had been a fracture of the tibia down at the distal end, that would be of significance, wouldn't it?

A. You mean a fracture of the fibula?

Q. Fibula, that is what I mean.

A. It would be of significance, of greater significance.

Q. I didn't understand.

(Testimony of Keene O. Haldeman.)

A. It would be of more significance than the upper one.

Q. All right. And that is because of the ankle joint movements, is that correct? A. It is.

Q. Now, you didn't get any history of a fracture of the fibula at that end, did you? I don't think you did. A. I think not.

Q. All right. Let us look at it very quickly then, Doctor. Going to put Libelant's Exhibit 3-F, taken the day of the accident, the left leg. There is just no question about the [341] fracture being there, is there?

A. There is a fracture involving the lower third of the left fibula.

Q. Now, so far as that fracture is concerned, I have another shot here, but I am not going to take the time to show it. If that hasn't united even to this date, and if the individual complains of pain on the outside of the leg as he proceeds to walk, would it be attributable in any way to the ununited fracture, if there is one?

Mr. Harrison: Your Honor please, I think the Doctor is certainly entitled to know that the fracture at the lower extremity has united.

Mr. Magana: I will look for it; I will look for it. [342]

Mr. Harrison: I believe it is a matter of record. Dr. Walker testified it had united satisfactorily.

Mr. Magana: Mr. Harrison, I have tried to look over the record. If that is the record, if that is your conclusion, there is no remark for me to discuss.

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(Testimony of Keene O. Haldeman.)

Q. (By Mr. Magana): All right, let's look at this. Let's see what it says here. I am going to put up libelant's Exhibit 21, Doctor, and so there is no mistake about it, I am reading from March 15, 1950, am I not?

A. (Going to shadow box): You are.

Q. That is a front to back view, is it not?

A. It is.

Q. Does that look united?

A. From the front view it looks united.

Q. But you can't conclude from just one view, can you, Doctor?

A. I would like to see a side view.

Q. Certainly. Let's take a look at libelant's Exhibit 22.

The Court: Taken when? Same date?

Mr. Magana: Same date, March 15th.

A. In the side—well—oh, yes, this is also a front view, which looks united.

Q. Down at the distal tip, is that right?

A. Yes.

Q. Whatever it is, the union that appears is the union you [343] see on this photograph, is that correct—on this radiograph?

A. In that film it looks united.

Q. I haven't time to look for the other one. Would you resume the chair, please?

(Witness resumed the witness chair.)

Q. (By Mr. Magana): Also, as I understood, this man did not complain to you of the right ankle,

(Testimony of Keene O. Haldeman.)

is that so? A. He did not so complain.

Q. I am going to show you libelant's Exhibit 3-C, taken the date of the accident. Will you step down and look at it? Now, looking at the astragalus, does that appear to be any type of pathology?

A. (At shadow box): There is a loose piece of bone lateral to the astragalus which could represent a recent fracture or an old fracture, I could not tell which.

Q. All right, let's take a look at March 15th of 1952, libelant's Exhibit 20, also of the right ankle.

A. To keep it in the same direction (changing film on shadow box), the fragment of bone is still seen.

Q. What about the medial side, Doctor?

A. On the medial side there is a separating piece of bone. Whether it represents old fracture or congenital condition I could not tell.

Q. Well, whatever it is, if it was congenital you would expect to see it on the first view, would you not, the one taken [344] July 28th of 1950?

A. A comparison of the two films would make me think that it is newly formed bone, probably in a ligament of the ankle.

Q. Representing an irritated process, Doctor, that is continuing in this man's case?

A. I am not sure.

Q. All right. I have just a couple more questions, Doctor. Here is an X-ray taken the 29th of October of the year 1951, libelant's Exhibit 31, both the right and left hips appear normal, don't they?

(Testimony of Keene O. Haldeman.)

A. The hip joints are normal. There may be a little less calcium in the upper end of the left femur than is present in the right.

Q. But of course the contour of the bones, the head of the femur and the acetabulum—is that what this is? A. It is.

Q. That looks to be all normal, doesn't it, Doctor? A. Essentially normal.

Q. Let's take a look at one just a few months later, libelant's Exhibit 32, taken also by the treating doctor. It is easy to find which is the right and which is the left, isn't it, Doctor? It is mentioned on the X-rays? A. Yes, this is the left.

Q. Doesn't look the same, does it? [345]

A. I would not say that there is any significant difference. The obvious difference is an appearance of hollowing out at the head of the femur, seen in the more recent film, which is not seen in the earlier one. But that is an anatomic structure called fovea, which I believe is visible here because of a difference in rotation of the hip joint at the time the film was taken.

That is shown by the greater trochanter appearing in the recent film farther out than it does in the earlier film, in which the greater trochanter overlies the head. In this case it is way out here, which means you are looking at a different circumference, horizon of the head of the femur; and we commonly see that depression or fovea in certain positions. I do not think that particular condition represents a pathological change.

(Testimony of Keene O. Haldeman.)

Q. You do see demineralization?

A. There is some demineralization still visible at the upper end of the right femur—left femur, correction.

Q. All right. Now, Doctor, finally some time ago, and I believe—when was your report written?

A. My report was written November 27, 1951.

Q. At that time you felt that in three to six months this man could do a light type of work, is that right? A. That is right.

Q. All right, that would be December, January, February—[346] we are almost through the fourth month?

Mr. Magana: Mr. Luehr, would you walk up here, please? And I wish you would observe him, Doctor.

Mr. Harrison: May I remark the doctor's testimony was that if the leg operation had been performed at that time, he then felt within three to six months. The leg operation has not been performed for some unknown reason.

(Libelant arose and walked toward the witness.)

Mr. Magana: That is all, Mr. Luehr, thank you.

Q. (By Mr. Magana): When you examined him, the man was cooperating with you in every way, wasn't he? A. He did.

Q. There was no question about his cooperation? You didn't feel he was trying to stretch anything, did you? A. I did not feel so.

(Testimony of Keene O. Haldeman.)

Q. Do you still feel at this time, Doctor, at the end of three to six months—I will withdraw that. Do you still feel at this time he will be able to do any light type of manual labor at the end of six months from this date?

A. He might six months from the present date.

Q. And do you feel, then, Doctor, so that I understand your testimony fully, that the only thing remaining to be done for this man, surgically or medically, is the operation on the tibial bone as such?

A. That is one operation that should be performed. I would [347] not take issue with a surgeon who felt that a spinal fusion should be done. I want to make the point clear that there are good surgeons who advocate such an operation, and I would not say that they are wrong to do it. I merely said that in my experience it was not necessary in the average case.

Q. All right. Now, Doctor, when you wrote—I will withdraw that. So far as this sequestrum of bone in the infection, as such, that is not producing any pain to Mr. Luehr, is it?

A. I think not. I think its effect is causing the slight drainage to persist.

Q. All right, that standing alone is not causing Mr. Luehr to limp, is it?

A. I should think not.

Q. Then when you gave the opinion—and I am referring now to the objection by Mr. Harrison that you heard—when you gave the opinion that this

(Testimony of Keene O. Haldeman.)

man would be ready from November to return to work in three to six months, you did not feel at that time that the operation for the leg or that the leg condition with reference to the sequestrum of bone had anything to do with reference to his prognosis?

Mr. Harrison: I object to that, your Honor. Mr. Magana refers to the man returning to work. The doctor has not testified the man could return to work as a stevedore. In [348] his direct examination he said he would be limited to semi-sedentary work. Mr. Magana asked if he could return and do light manual labor.

The Court: I think we are all agreed he is not in condition to engage in anything, only light work. I think that is accepted by everybody. However, you may answer the question. Read the question.

Mr. Magana: I will reframe it quickly.

Q. (By Mr. Magana): When you said he could return to work in three to six months, whatever work he did return to, light or otherwise, you had in mind that this operation was not contributing to his pain nor to his inability to move, is that correct?

A. Well, as you phrase the sentence, you said that the operation was not contributing to his pain nor his inability to move. I don't think you meant that. I think if you mean was that little sequestrum and that little draining sinus contributing to the pain and inability to move, I would say that they were not.

Q. That is what I mean. So that when you say in three to six months period he would be able to return to a light type of work, you meant that

(Testimony of Keene O. Haldeman.)

whether this healed spontaneously, the drainage, or whether he had to have an operation?

A. I meant that, for one thing, if he had to have the operation he should have it before he talked about going back [349] to work. In other words, he isn't going back to work while he is undergoing surgical treatment.

Mr. Magana: All right, that is all.

The Court: Any other questions, gentlemen?

Mr. Harrison: I don't think so, your Honor.

The Court: Just a moment, Doctor. I took time off yesterday to pay the doctor that appeared yesterday a compliment. I am going to ask you to make some observation in relation to this witness.

Mr. Magana: I will, your Honor. I think he is a very fair witness in the way he answered the questions.

The Court: Any disagreement?

Mr. Kay: We are all joined in that, your Honor.

The Court: All right, Doctor.

(Witness excused.)

Mr. Harrison: Your Honor, please, perhaps by way of explanation, I would like to either ask Mr. Kay for a stipulation on this or state this as a fact to the Court, that Dr. Walker made periodic reports to the Firemen's Fund Insurance Company concerning this man's progress, and the reason that Dr. Haldeman was not advised of these cord symptoms is that in Dr. Walker's reports to the Firemen's Fund Insurance Company there is no mention of any of

(Testimony of Keene O. Haldeman.)

these symptoms. I think Mr. Kay has read the report and will stipulate to that. At least in the August 1st, 1950, which [350] is the only one I have seen.

Mr. Kay: I haven't read them, but if Mr. Harrison states it is so. I gave both sides a copy of the report so that they would be fully advised.

Mr. Harrison: And it might explain why Dr. Haldeman was rather unprepared, the original examination Dr. Haldeman gave Mr. Luehr was purely preliminary, and when I realized we were going to trial in this case I asked Mr. Resner for further medical examination, which he refused.

Mr. Resner: You will recall, Mr. Harrison, at the outset of this trial we offered to submit Mr. Luehr to any doctor the Court or counsel cared to make.

Mr. Harrison: I just make that statement by way of explanation.

Mr. Resner: And we still make the offer.

The Court: I say this advisedly: We had two doctors here and I tried if possible, within reasonable limitations, to follow the testimony, and there isn't very much disagreement as I see it.

Mr. Harrison: I don't believe so, your Honor. I make this statement merely by way of explanation why Dr. Haldeman wasn't perhaps better prepared to testify.

The Court: It is 12 o'clock now. We will take an adjournment until two o'clock.

(Thereupon this cause was adjourned to the hour of two o'clock p.m. this date.) [351]

March 20th, 1952—2:00 o'Clock P.M.

Mr. Harrison: Your Honor, please, before opening the Government's case on the facts, I would like to take this opportunity to refresh or to restate the Government's position in this matter, since Mr. Resner and Mr. Kay have taken every opportunity to argue their interpretation of the Government's position and they have successfully, in my opinion, misconstrued or misstated it; and I would like to take this opportunity to make a very short statement of what our position is in this matter.

It is our position, your Honor, that, specifically with reference to these walking boards or scaffolding which we have suggested might have been used, it is not our position that had the man been under the airplane on scaffolding or walking boards, the injury would have been avoided.

It is our position that had walking boards or scaffolding been available, it would not have been necessary for the man to go under the airplane to perform the job which he was to do. Mr. Luehr has testified that he was there solely for the purpose of steadying the airplane. On recross-examination yesterday he said he was not there to adjust the platform, nor was he there to put the bolts into the landing gear that secured it to the platform. [352] He was there solely for the purpose of steadying the airplane.

It is the Government's position that the steadying job could have been done without going beneath the airplane, had there been a place for Mr. Luehr to stand elsewhere than under the airplane.

Now, Mr. Kay and Mr. Resner both have made much of the fact that had there been walking boards and Mr. Luehr had been under the airplane he would have been crushed. That is not our argument at all. Our argument is that had there been walking boards he would not have been under the airplane to perform the job of steadying it.

With that I would like to call my first witness. Mr. Mogan, will you please take the stand?

MATTHEW C. MOGAN

called as a witness for the respondent, U. S. A., being first duly sworn, testified as follows:

The Clerk: State your full name to the Court?

A. Matthew C. Mogan.

Q. (By the Court): Where do you reside, sir?

A. San Francisco, sir.

Q. What is your position and occupation?

A. I am general pier superintendent for the San Francisco Port of Embarkation.

Q. How long have you been so engaged? [353]

A. A little better than ten years.

Q. Prior to that time, what did you do?

A. I worked for the Hawaiian American Steamship Company for seventeen years as an assistant pier superintendent.

Q. And your present occupation is what?

A. General pier superintendent.

Q. What are the duties of a general pier superintendent?

A. Over-all supervision of cargo operations on

(Testimony of Matthew C. Mogan.)
piers controlled by the Army, or contract piers under contract to the Army.

The Court: Proceed, counsel.

Direct Examination

By Mr. Harrison:

Q. Then, in your capacity as pier superintendent, Mr. Mogan, are you familiar with the fact that a man was injured in July of 1950 while planes were being loaded aboard the S.S. Shawnee Trail?

A. Yes, sir.

Q. And you are also aware that the Army derrick barge B.D.-3031 was alongside the Shawnee Trail assisting in that loading operation?

A. Yes, sir.

Q. Will you give us, just for the education of all of us, Mr. Mogan, a brief resume of the arrangements that were made to have this barge alongside the Shawnee Trail, and the [354] standard operating procedure for making such arrangements when it is required?

A. Well, the main job, you might say, is to order Army cargo to the port that is destined for overseas bases, and we do use our own facilities at the Oakland Army base, and also use other facilities which are under contract.

At Alameda, that was formerly operated by the air force as a loading place for airplanes. These thirteen planes which were arranged to be loaded on this particular vessel were ordered into Alameda for loading. Likewise, the ship had no particular

(Testimony of Matthew C. Mogan.)

gear, so we had to have a barge in order to do the loading. Inasmuch as the Army has their own heavy lifting gear, we ordered the barge over there to perform this work.

Q. What are the details of that arrangement? Who decided the barge must go alongside?

A. Of course we have the barge. It is owned by the Government. It is just more a matter of economy to use their own barge rather than go out and hire a commercial barge.

Q. In this particular instance, you are aware the Jones Stevedoring Company was doing the stevedoring?

A. They perform all the work for the Army on outside piers. We instructed Jones Stevedoring Company to place the gang of longshoremen there to perform the actual loading operation and the Government furnished the heavy lift barge. [355]

Q. Once this derrick is alongside the vessel that you are to load these B.D.-3031's on, once it is alongside the vessel, are there any further instructions given to the barge foreman from your office?

A. Always during a plane loading operation there is a representative of the United States Air Force there who lays out the plan beforehand as to the exact location the planes are to be placed. He likewise instructs the Jones Stevedoring Company walking boss where he wants the planes placed, and the Jones' walking boss will give the instructions to the signal man of the derrick barge as to when he wants it lifted to raise it in position. All

(Testimony of Matthew C. Mogan.)

employees on the barge being Government employees, of course.

Q. Once the barge is alongside and they are ready to load, Jones takes over the operation?

A. He is the stevedore doing the actual loading of the cargo.

Q. To your knowledge does any other department of the Government direct the operation once it is alongside that vessel?

A. I don't understand the question.

Q. You mentioned that Mr. Rosenstock, the air force representative, is present, and you say he merely tells Jones' foreman where he wants to put the airplanes? A. That is correct. [356]

Q. Does Mr. Rosenstock or any other army officer or Government official direct the derrick operation, that is, the actual lifting?

A. That is supposed to be——

Mr. Kay: Just a moment. We object to this line of testimony on the ground that no proper foundation has been laid. There is no showing this witness was there to observe any of these things.

Mr. Harrison: I am just asking general knowledge. I will withdraw the question, your Honor.

Q. (By Mr. Harrison): Are you familiar with the contracts which the Government makes with the contract stevedores in a general way?

A. From an operative standpoint, yes, sir.

Q. Do you know, under the contract, who provides walking boards, slings, dunnage, and other things?

(Testimony of Matthew C. Mogan.)

Mr. Kay: I object to that on the ground that the contract is the best evidence, your Honor.

Mr. Harrison: I am merely doing this—the contract is a very long document.

The Court: Well, the phase of it you have in mind, read from the contract and ask if he is familiar with it and spell it out.

Mr. Harrison: All right, I will do that, if you will bear with me while I dig through it here. Well, perhaps we [357] can avoid all this with another question, your Honor.

Q. (By Mr. Harrison): Is it your general practice to have available for contract stevedores walking boards, slings, dunnage, and other accessories?

A. We have two types of contract as far as stevedoring is concerned. At the Oakland Army base we furnish all the gear required in connection with stevedoring operations. At outside piers, particularly in the case of Jones, they furnish their own equipment.

Q. I see.

A. However, had request been made for walking boards, I presume we would have furnished them.

Q. I have now found the specific provision in the contract which was in effect at this time, which has been pleaded as a matter of record in this Court, your Honor. There is a section entitled, "Section 1," which I assume is a subsection of Article 1, which states:

"Gear supplied by the contractor"——

(Testimony of Matthew C. Mogan.)

Mr. Kay: Pardon me, Mr. Harrison, what page of the contract is that on?

Mr. Harrison: A.P.-6-3-1.

Mr. Kay: Under Article 1?

Mr. Harrison: 1-I. It states:

"The contractor shall perform an efficient stevedoring operation, and to this end will furnish, [358] at its own expense, all necessary and proper gear, including the following: Ammunition gear when handling ammunition, roller conveyors, hooks, cargo nets, save-all nets, rollers, skids, machinery, dollies, chain slings, platform slings, wire and rope slings, heavy lift slings used in connection with heavy lift cranes, trailers, hand and four-wheeled trucks, pipe trucks, hatch and rain tents, pallets."

Q. (By Mr. Harrison): To the best of your knowledge, is that the provision of the contract?

Mr. Kay: Just a minute, that isn't—we object to this line of questioning. This contract speaks for itself. We admit that that is the contract we had with the Government, and this witness is being asked to merely corroborate or verify what is in the contract.

Mr. Harrison: I was trying to facilitate bringing it to the Court's attention, your Honor.

The Court: Very well, proceed.

Mr. Harrison: I believe that is all I have from this witness, your Honor.

The Court: Any questions, gentlemen?

Mr. Resner: I have no questions from the gentleman.

(Testimony of Matthew C. Mogan.)

Mr. Kay: I just have a question, your [359] Honor.

Cross-Examination

By Mr. Kay:

Q. Are you familiar with all the provisions of this contract? A. Yes.

Mr. Harrison: I object on the ground the contract is the best evidence.

Mr. Kay: I didn't ask him about it. I just asked if he was familiar with it.

Mr. Harrison: He already stated he was.

Mr. Kay: Did he?

Mr. Harrison: Yes, I asked if he was and he said yes.

Q. (By Mr. Kay): Is that your testimony?

A. I said from an operative standpoint I am familiar with it. However, I am not the contract officer of the San Francisco port of embarkation and I do not participate in writing the contract.

Q. What is that?

A. I do not participate in writing the contract.

Mr. Kay: That is what I was pretty sure was the situation. Thank you.

The Court: You have enough to do without taking on any more tasks, isn't that right?

A. I think so, Judge, particularly in these days.

The Court: Any more, gentlemen?

Mr. Kay: No, your Honor.

(Witness excused.) [360]

Mr. Harrison: I would like to call Mr. Max Rosenstock.

MAX ROSENSTOCK

called as a witness for the respondent, U. S. A., being first duly sworn, testified as follows:

The Clerk: State your full name to the Court.

A. Max Rosenstock—R-o-s-e-n-s-t-o-c-k.

Q. (By the Court): Where do you reside?

A. San Francisco, sir.

Q. What is your address?

A. 1286 O'Farrell Street.

Q. What is your business or occupation?

A. Air Force loading technician.

Q. Loading——

A. Technician. On planes.

Q. What is the nature of the activity? I don't know very much about it.

A. Make plans where a plane should be spotted. If the stevedore has trouble hooking up the bridle, I explain the way it should be hooked up.

Q. You are employed by who?

A. The United States Air Force.

Q. How long have you been so engaged?

A. Nine years.

Q. Prior to that time what was your occupation? [361]

A. I was in business for myself, in the fur business.

The Court: All right.

(Testimony of Max Rosenstock.)

Direct Examination

By Mr. Harrison:

Q. You had this job, then, on July 28th, 1950?

A. That is right.

Q. The job you have just described. Do you recall where you were on July 28th, 1950, Mr. Rosenstock?

A. Right there on the Shawnee Trail.

Q. Then you are familiar with the fact that a man was injured during that loading operation?

A. Right, sir.

Q. Can you tell us what you saw of the accident?

A. I couldn't say exactly what happened to the man. I know the plane dropped about three feet, and then I heard a man scream, and that is all I know of it.

Q. Where were you standing?

A. Right on the catwalk, near the plane.

Q. Do you know where the man was?

Mr. Kay: Just a moment. He said he could not see the man or could not say much about the man.

Mr. Harrison: He said he didn't know what happened to the man, I believe.

Mr. Kay: May I have that read back?

The Court: Certainly. Read the last two questions and [362] answers, Mr. Reporter.

(Questions and answers read by the Reporter.)

(Testimony of Max Rosenstock.)

The Court: Let the question and answer stand. Proceed.

Q. (By Mr. Harrison): Can you tell us what you saw of the accident in general from your position on the catwalk? Were there other men under the plane or near the plane?

A. There were quite a few men near the plane.

Q. What were they doing?

A. Taking the plane off the crane, put them on stands, which I have a picture of those planes. We put the plane on the stand.

Q. At this particular time did you give any orders or directions to Mr. Cates, the barge foreman, or Mr. Bailey, the crane operator?

A. No, sir.

Q. Who was giving these men their orders?

A. Mr. Ted Spirz.

Q. Mr. Rosenstock, we have a model of this mechano deck over there. Can you tell us, just estimate, how far apart the port and starboard beams are—port to starboard beams? Do you know?

A. It all depends how the ship comes in. We have to go in according to the position of the plane.

Q. Those are the fore and aft beams that are moveable. I am talking about the thwartships. [363]

A. About ten feet.

Q. About ten feet apart? A. Right.

Q. Does that accurately represent the fact that there is considerable space between the beams when they are spread out? A. That is right, sir.

(Testimony of Max Rosenstock.)

Q. Were the stevedores who were steadying these planes—where did they stand when they are doing this operation?

A. A few of the men were in front of the plane, right at the nose gear, and a couple of men at the after end of the plane.

Q. Were they standing on the main deck or beams? A. On the beams.

Q. Any men on the main deck?

A. No, except Mr. Spirz was on the catwalk.

Q. Do you know who directed the men to get up on the beams?

A. That is Spirz's function.

Mr. Kay: I move to strike that answer on the ground it obviously is not responsive. I object to the question on the ground no proper foundation is laid. Rather, I will withdraw that. I ask that that answer be stricken because it wasn't responsive.

The Court: The answer may go out. [364]

Mr. Harrison: I asked if he knew who told the men to get up on the beams to perform their function.

The Court: Well, you got an answer.

A. Mr. Spirz.

The Court: Give him the answer. Read the answer, Mr. Reporter.

(Answer read by the Reporter.)

The Court: That is your answer to the question. It may be stricken. Develop the facts, whatever they may be.

(Testimony of Max Rosenstock.)

Q. (By Mr. Harrison): I will ask you again, do you know who told them—without telling me who they are—do you know? A. Yes, sir.

Q. Yes, you do? Who was it?

A. Mr. Spirz.

Q. Thank you. Was there at the time of the accident, Mr. Rosenstock, any planking over this skeleton or mechano deck? A. No, sir.

Q. Did anyone from the Jones Stevedoring Company ask you for any material to build such—for any such planking at all? A. No, sir.

Q. They did not? A. No, sir.

Q. I ask you from your observation of this operation, Mr. [365] Rosenstock, that if there had been some planking provided, would it have been possible for the men to stand clear of the airplane to steady it as it came down prior to the time that it was necessary for someone to go underneath and attach the bolts that hold the landing gear to the platform?

Mr. Kay: Just a moment. Your Honor, I object to that on the ground no proper foundation has been laid as to this witness. And the question obviously doesn't contain enough elements to give an intelligible answer.

The Court: I suggest you lay a foundation.

Mr. Harrison: I submit, your Honor, the man was there and saw the operation. I have asked him from his observation could he determine this.

The Court: Lay the foundation, if you can. Read the question, Mr. Reporter.

(Testimony of Max Rosenstock.)

(Question read by the Reporter.)

The Court: My suggestion was it is possible for you to lay a better foundation in order to have him give his opinion on that question.

Mr. Harrison: Well, I submit, your Honor, that any eye witness of this operation could determine whether or not it would have been possible.

The Court: I don't think so. I could be in error. However—how long have you been engaged in this activity? Did you load any of these ships before with these planes on? [366]

A. Hundreds of them.

Q. Hundreds of them? A. Yes.

The Court: Under conditions of this kind?

A. Same deal.

The Court: That is what I had in mind.

Mr. Harrison: I see, your Honor. I am sorry, I had overlooked the fact that we had to qualify him in that regard.

The Court: I just offered the suggestion to you.

Mr. Harrison: I was so familiar with the fact that he was doing this operation ever since the war.

The Court: Keep in mind the record. It won't be in the record unless it is developed.

Q. (By Mr. Harrison): With that foundation which the Court has so kindly laid, can you tell me —and perhaps I will rephrase the question—if planking had been put over this skeleton deck so that the men would have had another place to stand other than on the beams, would it have been pos-

(Testimony of Max Rosenstock.)

sible for the men to stand clear, that is, out from underneath this airplane to steady it as it came down, prior to the time that it was necessary for someone to go under there and fasten the landing gear to the platform?

Mr. Kay: I object to that on the ground that it is incompetent, irrelevant and immaterial; no proper foundation [367] laid, and calls for the conclusion and opinion of the witness.

The Court: In what respect has the foundation not been laid?

Mr. Kay: In this respect: He said he has seen hundreds of them. We don't know if they are the same as in this particular proceeding.

The Court: I asked——

Mr. Kay: They are different types of planes and different circumstances in each case. In this particular case there is no showing whether he actually saw, how much of it he saw, and so far as we know he saw very little. He says he didn't see exactly what happened. As to the planking, there is no—in the question alone, it does not indicate planking on the platform, how much, things of that nature. This would be highly speculative—a highly speculative answer.

Mr. Harrison: I submit, your Honor, this matter could go along much more smoothly if Mr. Kay would tolerate, perhaps, some of my inexperience in these matters. He is taking a very strict advantage of a highly technical position.

Mr. Kay: No, I don't intend to do anything of

(Testimony of Max Rosenstock.)

the sort. I think Mr. Harrison has done an admirable job to date on very little. I think he can take good care of himself. [368]

Mr. Harrison: I am not asking for your pity. I am asking for your consideration of all of us, Mr. Kay. We would like to get this case under way. I am quite sure you can make some spurious objections to every question I ask.

Mr. Kay: That is not it. I am not being facetious about this. In your question there is no description where they would put them, how many, what a man would have to do at a particular time, where the planking would be, with reference to the mechano deck at what juncture of this operation, all those things would have to go in.

The Court: I am sure you can develop that on cross-examination.

Mr. Kay: I most certainly shall, your Honor.

Mr. Harrison: I feel if the witness is as confused as Mr. Kay seems to be, he could qualify his answer accordingly.

The Court: Proceed.

Q. (By Mr. Harrison): Could you answer that question? You have probably forgotten it now, haven't you, Max?

A. I haven't forgotten it, but I couldn't remember the position this particular man was in.

Q. No, but answer the question, from your observation whether or not—we will shorten it—could a man have steadied this airplane without standing directly underneath?

(Testimony of Max Rosenstock.)

Mr. Kay: Your Honor, please, I have to make the same [369] objection. Here is a witness who testified he couldn't see where this man was, what position.

Mr. Harrison: I am not asking that man.

Mr. Kay: Then it is incompetent, irrelevant and immaterial.

The Court: Read the question, Mr. Reporter.

(Question read by the Reporter.)

The Court: It goes to the weight of the testimony and I will allow it. The objection will be overruled.

Q. (By Mr. Harrison): You may answer the question. A. It can be done.

Q. It can be done? A. Yes.

Mr. Kay: Pardon me, your Honor. So that we will have this again, may I have that last question and the answer re-read, please?

The Court: Certainly. Read the question, Mr. Reporter.

(Question and answer read by the Reporter.)

Q. (By Mr. Harrison): Max, during this particular operation to which we have referred on July 28th, 1950, did you at any time comment to anyone from the stevedoring company regarding the methods that were used in loading these planes?

A. No, sir.

Q. To your knowledge, Max, were there planks or scaffolding of sufficient length, that is, over ten

(Testimony of Max Rosenstock.)

feet long, available [370] to the stevedores should they have asked for them? A. Yes, sir.

Q. Did they ask you for them? A. No, sir.

Q. Do you know if they asked for them?

A. No, sir.

Mr. Harrison: Thank you, that is all. [371]

Q. Do you know if they asked anyone for them?

A. Not that I know of.

Mr. Harrison: Thank you, I think that is all.

Cross-Examination

By Mr. Resner:

Q. Mr. Rosenstock—— A. Yes, sir.

Q. You have worked with the Army for some nine years in this same general type of work?

A. Right, sir.

Q. The planes that were being loaded on the Shawnee Trail on the day in question were of what type of plane? A. F-80.

Q. Is that a jet plane?

A. That is a jet plane.

Q. There is testimony here that they loaded them in sections, the parts?

A. That is right, the aft fuselage is off.

Q. The F fuselage, what is that?

A. Aft end, the aft end of the plane.

Q. Well, how is that loaded?

A. That was loaded on the other side which—that is only about 20 feet.

Q. The part you were loading on the side where this accident happened was what?

(Testimony of Max Rosenstock.)

A. The forward fuselage, the main [372] fuselage.

Q. With the wings?

A. Landing gear and wings.

Q. Landing gear and wings? A. Right.

Q. What is the wing spread?

A. About 38 ten.

Q. Thirty-eight ten. What is the width of the fuselage? A. That is the spread.

Q. The spread, but the uselage itself, you say the spread is thirty-eight ten?

A. That is right.

Q. But part of that is fuselage? A. Yes.

Q. What is the width of the fuselage?

A. I couldn't say exactly, it would be about nine feet, I believe.

Q. Does it come down and is rounded underneath the wing? A. Right.

Q. How far does the bottommost part of the fuselage extend beneath the bottom part of the wing? A. You mean the floor?

Q. Yes. A. Be about two and a half feet.

Q. From the juncture of the curvature, that is, if that is the wing spread (indicating), and that is the bottom of [373] the fuselage, is that a very rough illustration?

A. You mean that is the nose?

Q. No, that is the bottom part.

A. See, on the after end that runs level, there is no break there.

Q. No break here (indicating)?

(Testimony of Max Rosenstock.)

A. No, that is where the aft end comes off.

Q. That is level? A. That is right.

Q. Completely?

A. About, maybe a couple inches sticking out, but not much.

Q. Like that (indicating)?

A. That is right.

Q. From the point where the top part of the fuselage joins the wing there are struts on the underside of the wing, are there?

A. Of course, that is a tricycle landing under the nose and two under the wings.

Q. How many feet over is the landing gear from the point where the fuselage joins the wing tips?

A. From the landing gear to the nose, landing gear—the landing gear?

Q. No. A. I don't get——

Q. This rounded section (indicating)? [374]

A. Represents the nose, that is the nose.

Q. We are looking at—this is a cross-section?

A. Yes.

Q. And we are looking forward, the nose would be up here, this is the after part which has been——

A. But that is not the aft part, the way you show it.

Q. Maybe it isn't clear to you. The part that you land on this particular type, if that is the nose, and then you have the wings coming out on both sides and the after part is off. A. No aft part.

(Testimony of Max Rosenstock.)

Q. That is right, you were landing, but you were just landing the nose and wings?

A. That is right.

Q. All right. Now, I am assuming that the nose is up forward? A. That's right.

Q. That's the nose, this part in here?

A. Yes.

Q. This part here then represents the aft part of the section you were loading, the rear part of it?

A. The rear part goes separate, you know, we put that way on——

Q. I am afraid, Mr. Rosenstock, I am not making myself very clear to you. [375]

A. I can show you an illustration, I have a model——

Q. Well, we have a picture here. Here is a photograph. A. I will show you exactly.

Q. You mind, Mr. Rosenstock? A. Yes.

Q. Well, we will get to yours in a moment. This is a—— A. This is the nose.

Q. Yes, exactly; there is the nose.

A. That is right.

Q. And this is the after end?

A. That is right.

Q. The end aft? A. Right, sir.

Q. That circular part I have drawn closest to us is supposed to represent that aft part?

A. That is right.

Q. Is that clear to you? A. That is right.

Q. And the part that is closest to us is the same thing. The question I am trying to get to you, you

(Testimony of Max Rosenstock.)

see here the curved portion of the fuselage comes to meet the wing? A. Yes.

Q. All right. From this point how far out toward the wing tip is the landing gear, how many feet out?

A. It would be about 15 feet. [376]

Q. Fifteen feet?

A. Fifteen feet, something, you know.

Q. Fifteen feet from where?

A. From the nose to the tip, from the belly to the tip; from here to there (indicating).

Q. Well, here we are——

Mr. Harrison: Just a minute, Mr. Resner, what have we got?

The Witness: Got a model.

Q. (By Mr. Resner): This is the part you were loading?

A. That is the part we were loading.

Q. What I am getting at, where do the wheels come in?

A. In here, one here, and one on the nose.

Q. Exactly, that is what I am trying to get at.

A. Correct.

Q. Exactly what I wanted to know.

A. That is the aft end, it is put together, the motor goes in there, and that makes it up——

Q. This is the nose, these wings, and this is the tail?

A. The motor goes in here and part of the tail.

Q. The motor is in that?

A. Yes, it is a jet motor.

(Testimony of Max Rosenstock.)

Q. All right. This is where the wing comes in, I mean, the landing gear? A. One here. [377]

Q. One here (indicating)?

A. That is right.

Q. One here (indicating)?

A. That's right.

Q. And one here (indicating)?

A. That's right.

Q. All right. Now, the question that I am asking you, Mr. Rosenstock is this: These wheels under the wings—— A. Yes.

Q. ——are how many feet from the juncture of the nose or the fuselage to the commencement of the wing?

A. You mean from the leading edge to here?

Q. Yes.

A. Be about three and a half or four feet.

Q. Three and a half or four feet, that is what I wanted to know. So it would be possible for a man to, in loading one of these planes, reach with one hand to the strut on the landing gear, put one hand up here on the landing gear, and then you put your other hand up here on the fuselage underneath the fuselage. You follow me?

A. The man doesn't hold onto the fuselage exactly.

Q. Nothing to hold on to, is there?

A. You see, three men working, you know, one will stay on the aft end, hold on to the nose.

The Court: You say three and a half from both those [378] points?

(Testimony of Max Rosenstock.)

The Witness: That is right, sir.

Mr. Resner: That is right.

Q. Now, my point is this: A man can reach out and he will have his hand on the strut like this on the landing gear—— A. Under the plane.

Q. Under the plane, and holding on to that?

A. Yes.

Q. Steadying it? A. Right.

Q. And another hand here and also holding on to the plane at least has a hand against the plane. You understand me? A. No.

Q. You don't? Well, you explain it to me, Mr. Rosenstock.

A. One man stays here, on one landing gear, on the tripod.

Q. Yes.

A. Another man on this side. He can't—this man on the right side can't reach on the left side.

Q. Of course not.

A. And one man stays on the nose to steady it.

Q. Yes. All right. What I am getting at, when you are bringing this plane down, steadying it down, it is necessary to grab hold of the plane, isn't it? A. That is right.

Q. Of course, when you grabbed hold what is there on the [379] plane to grab hold of?

A. Hold of the wings.

Q. What else? A. That is all.

Q. And the tripod?

Mr. Harrison: I suggest, your Honor, the witness has answered.

(Testimony of Max Rosenstock.)

The Witness: Then on the tripod after, when the plane comes low enough.

Q. (By Mr. Resner): Isn't there a strut or something that you can hold onto there?

A. No, sir.

Mr. Harrison: I suggest, Mr. Resner is trying to change the witness' testimony, he testified that they grabbed on to the wing.

The Witness: That is what they do, the only way you can control the plane.

Mr. Resner: Wait a minute, now.

The Court: Just a moment. Everybody is acting in good faith, everybody will get an opportunity.

Q. (By Mr. Resner): Mr. Rosenstock, when do you put on the tripods?

A. When the plane is steady on the hook and stayed.

Q. How high is the plane above the mechano deck?

A. Two and a half, three feet, so the man can get to it. [380]

Q. Now, what does he fasten those tripods to?

A. The tripod goes in, right into the landing gear. There is a collar and a bitt.

Q. (By Mr. Resner): How large is the collar?

Mr. Harrison: Mr. Resner——

A. The collar would be two and a half, three inches.

Mr. Harrison: I object to this line of questioning, your Honor, on the ground that there is no testimony in this case that Mr. Luehr was attempt-

(Testimony of Max Rosenstock.)

ing to put the tripod on or doing anything similar. He says he was steadying the airplane, he said he had no bolts, had no platforms, and I assume from that he had no tripod, although I didn't ask him. I object to the question as entirely outside the scope of proper cross-examination.

Will you read the last question?

(Record read by the Reporter.)

Mr. Harrison: That isn't the question I objected to, I tried my best to object, but Mr. Resner persisted.

Mr. Resner: Mr. Harrison, I am not psychic, and I can't anticipate.

Mr. Harrison: You can hear.

Mr. Resner: I can't hear an objection until it is offered, sir.

The Court: Would you go back and read the last two or three questions? [381]

(Record read by the Reporter.)

The Court: Overruled. Let the record stand.

Mr. Kay: Mr. Reporter, may I have the page number?

The Reporter: 507.

Q. (By Mr. Resner): Now, this collar that is a part of the landing gear is an object, of course, that can be held onto with one's hand?

A. You can hold on a million places. What we do is hold onto the planes in order to steady the plane.

(Testimony of Max Rosenstock.)

Q. Now, this object that we are talking about is something you can grab ahold of with your hand?

A. Sure, you can grab anything.

Q. Anything you can hold onto, of course.

A. There is plenty of places to hold on to the wing.

Q. Hold on to the wings?

A. That is right, steady the plane.

Q. Steady the plane? A. That is right.

Q. And carried down to the place above——

A. Then we put on the tripod.

Q. And then you guide it down on the blocks?

A. Platform.

Q. On these three-corner platforms. There was nothing different in the way that this operation had been performed at the time that Mr. Luehr was hurt than any of the other [382] 12 or 13 planes that you had loaded? A. The same function.

Q. Except this plane fell on the man?

A. Just dropped a couple of feet.

Q. Crushed the man between the plane and the mechano deck?

A. I didn't see him get crushed, just didn't see, I was excited, a lot of hollering, trying to see how much damage there was to the plane——

Q. You were more concerned with the plane than you were with——

A. When he fell that is exactly what happened.

Q. I didn't hear you.

A. I—I was watching what happened to the plane, I heard somebody scream.

(Testimony of Max Rosenstock.)

Q. You were more interested in the plane?

A. I wasn't interested in the plane, but I was watching the plane.

Mr. Harrison: I object——

The Witness: To see how much damage to the plane, and found out afterwards the man was hurt.

Cross-Examination

By Mr. Kay:

Q. Mr. Rosenstock, you were in the fur business before you were assigned to work on these loading operations, is that right?

A. That's right, sir. [383]

Q. What experience did you have in connection with loading to qualify you to be an expert for the Army?

A. I worked for two years on ships first, you know, with another man.

Q. This was before you went with the Army?

A. No, sir, with the Army, not on planes, on all general cargo and working and helping the men on the planes at the beginning.

Q. They brought you in to teach you to do loading, but you have worked on general cargo, is that right?

A. Well, usually on some of the ships you load general cargo, and on deck load, we load planes, work on boats.

Q. Let us go back when you were first assigned to this work, you were in the business first where?

A. Right here in San Francisco.

(Testimony of Max Rosenstock.)

Q. How did you happen to get in this business with the Army?

A. I applied for a job, I was out of business then, got a job with the Air Force.

Q. When was that? A. '43.

Q. Now, before '43, you had not the slightest idea of loading operations on a ship, whether it was a plane or general cargo, is that right?

A. I didn't get it right, what was it?

Mr. Kay: Will you read the question? [384]

(Question read by the Reporter.)

A. That is right.

Q. And when you applied to the Army they sort of gave you a training period, is that right?

A. That's right.

Q. Well, what is the first thing you did in that training?

A. Used to check cargo aboard ship when they load Air Force cargo, especially planes, gliders.

Q. Did you do that yourself or——

A. No, there was another gentleman.

Q. And you went around with him and you saw how he checked the cargo, is that right?

A. How we load cargo, that is right.

Q. What month in '43 was that?

A. Must have been around, March or April.

Q. And when you went around with this man to see how you load cargo what did you do, how did you do that? Just watch him?

A. Just watch him.

(Testimony of Max Rosenstock.)

Q. Did you ever yourself do any loading?

A. Not at the very beginning.

Q. Well, how long was it before you actually did any loading yourself?

A. About eight or nine months.

Q. And what kind of work was that?

A. Well, actually I don't do any loading right now, just [385] make up the plans and instruct people to be loaded.

Q. Instruct them how to do it, but you, yourself, never had actual experience like a stevedore, is that right?

A. Nine years is a long experience.

Q. How is that?

A. I worked for nine years.

Q. Not that long in '43. A. '43.

Q. All right, you say it was nine months before you did any loading? A. That is right.

Q. Did you actually do any loading yourself like the stevedores do? A. No.

Q. And when was it that you ever had anything to do with the plane?

A. With the planes for the last seven years.

Q. Well, how long after you went with the Army in March or April of 1943 did you first have anything to do with loading planes?

A. Just watching the load.

Q. I am afraid you missed——

The Court: Just watching the loading.

The Witness: Just watched the gentleman load.

Q. (By Mr. Kay): Well, all right. How long

(Testimony of Max Rosenstock.)

was it before [386] you started watching them load airplanes?

A. What do you mean, how long?

Q. Well, you went to work for the Army in March of 1943. How long after that was it that you first even watched the plane being loaded?

A. Right straight ahead from the very beginning.

Q. From the very beginning when was the first time you saw any loading on a mechano deck?

Mr. Harrison: Your Honor please, I object to questions along this line. This man is not introduced as an expert, he is introduced as an eye witness, not as an expert. If Mr. Kay is attempting to disqualify him as an expert, I say he is wasting his time. I object to this line of questioning.

Mr. Kay: When I made that objection before it was obviously for that reason that this man was not qualified as an expert, that no proper foundation was laid. Your Honor gave Mr. Harrison the benefit of the doubt and allowed him to testify that if there were planking and so on, or could the men work with planking.

The Court: I have given you equal opportunity. Proceed. Objection overruled.

Mr. Kay: Will you read the question?

(Question read.)

The Court: Do you understand that question?

The Witness: Yes, sir. It was in 1944. [387]

Q. (By Mr. Kay): '44; what part of '44?

(Testimony of Max Rosenstock.)

A. At the beginning of '44.

Q. And now, I will ask you this: Up to the present day have you yourself ever participated in actually handling the planes in loading them, in putting them on the mechano decks?

A. No, my job is to make up the plan, tell them exactly where the planes go, where it will fit. I worked that out according to the scale and aid of scale, tell them exactly where the plane is going to fit and where it should be.

Q. All right. You don't presume to know, Mr. Rosenstock, just how these stevedores do their work, you are not a stevedore, are you?

A. Not a stevedore. I know how they should be loaded; exactly how they should be loaded.

Q. You feel you know how to handle the loading of a plane better than a stevedore who has been loading for years? A. Yes, sir.

Q. You do? A. Yes, sir.

Q. You base that on what experience?

A. On the eight or nine years experience.

Q. Your experience in watching the loading qualifies you to know how to load planes better than stevedores, is that what you say?

A. That is right, I take up the planes myself without the [388] stevedores off the barges.

Q. Very well.

The Court: You are making a comparison there with the stevedores; you have to make some distinction in relation to the stevedores themselves.

Mr. Kay: That is correct, your Honor.

(Testimony of Max Rosenstock.)

The Court: Good, bad and indifferent. Keep that in mind. Goes to the weight of the testimony.

All right, proceed.

Q. (By Mr. Kay): I think we all know that. Now, Mr. Rosenstock, you said that it might be possible that a man could have stood, could have steadied the plane without standing underneath it. Now, you're talking about a plane coming over from the barge and it is up in the air and they have tag lines on it? A. Right.

Q. Right. And in that case these tag lines are alongside, some of the men can stand out apart from each other and away from under the plane?

A. Correct.

Q. And that is why they are providing these tag lines so that they can steady this plane while it is coming up overhead? A. That is right.

Q. Now, that operation is followed until that plane is put down to the position just before they are ready to land it on [389] the platform; right?

A. That is right.

Q. And when they get to that point the tag lines are no longer of any use, is that correct?

A. That is right.

Q. And from that point on the men have to steady that plane by holding on to some part of the plane, is that correct? A. That is right.

Q. And the best place to do that is where you can get a solid hold on the plane, is that correct?

A. Correct.

Q. And the strut is about the best place?

(Testimony of Max Rosenstock.)

A. The strut, you can't balance as on the wing tips, nose, the only way you can steady a plane.

Q. What is there on the wing tip or on the fuselage on which the man can get ahold better than the strut? Will you show the Judge on this picture? A. Yes, sir.

Q. All right.

A. Right under the nose, here. Right on the tip here (indicating).

Q. Yes.

A. Here, under the leading edge, trailing edge, wouldn't make much difference, and over here (indicating). The nose controls the plane. [390]

Q. Will you show the Judge where on the wing tip or at the nose there is anything the man can hold onto other than the wing tips or the nose itself?

A. Anybody take that little model so I can show it exactly——

Q. No, let us look at the picture, this is the plane we are talking about.

A. Okay. Here is the plane here. The plane is on the hook raised a little to have our control here, and the same thing here (indicating)——

Q. Now—— A. ——balance the plane.

Q. Now, how does—you can push it, by pushing against an edge like that, that is understandable, is that right? How do you pull it?

A. When the plane is steady, you don't pull it, just three feet high.

Q. You say you only steady it by pushing it?

(Testimony of Max Rosenstock.)

A. No, by holding on.

Q. What do you hold on to?

A. Here (indicating).

Q. Where is the wing?

A. Here is the wings.

Q. Are there any handles or anything of that sort that a man can get a firm grasp on on the wingtip? A. They don't need handles. [391]

Q. There are none? A. No, there isn't.

Q. Is there anything like that on the fuselage?

A. On the nose.

Q. What is there on the nose you can get a firm hold on with your hand?

A. There is a little pad, we call it a jack pad.

Q. The fuselage in this case is how many feet forward of the tripod that was to be landed on the platform? A. From the nose to the tripod?

Q. Yes. A. Six feet.

Q. Six feet? You say that it is only six feet from this tripod out to the nose of this plane?

A. Talking about from the leading edge to the nose?

Q. I am talking about the tripod.

A. Tripod to the nose, be about 12, 13 feet.

Q. Now, if you stood at the nose of this plane and you were trying to steady this plane as it was being guided into position on that platform, you wouldn't have a very good view of the platform and where this tripod was to be landed, would you?

A. You would.

(Testimony of Max Rosenstock.)

Q. Wouldn't you have a better view back there than you would right at the tripod? [392]

A. No, you can see from the tripod, too.

Q. You can see what?

A. You can see—have a good view.

Q. All right. You know that as the Government representative the Navy man, the Army man, whose business was to see that these planes weren't damaged when they were landed, is that right?

A. Also landed on the right spot.

Q. Exactly. A. Make up the plane.

Q. Exactly, that had to be done precisely?

A. That is correct.

Q. And in order to get that landed down there precisely on that platform when that plane was put in the approximate position where it was held still, the men tried to steady and guide it down and keep it steady so that it would get down on that platform, is that right? A. That is right.

Q. And the best way to do that is to get the nearest to that platform, isn't that correct?

A. After it is lowered? That is right.

Q. Yes. Now, Mr. Rosenstock, I guess you have seen how many ships, mechano decks, that is, that have been loaded with airplanes in your career with the Army; how many would you say? [393]

A. I can't say.

Q. Thousands?

A. I wouldn't say thousands.

Q. Hundreds?

A. About one hundred on mechano decks.

(Testimony of Max Rosenstock.)

Q. You have seen one hundred ships with mechano decks loaded with planes, is that right?

A. That is right.

Q. Some of this time that work was done by stevedores working directly for the Army; right?

A. Doing the work, that is right.

Q. And then later the men worked for stevedoring companies such as Jones and West Coast Terminals, is that right? A. That is right.

Q. What other companies?

A. With the exception—locally I have seen, those are the only outfits.

Q. Those two. Did you—by the way, did you do any of this work other than at, in this Bay Area?

A. Yes, sir.

Q. Where else?

A. Liverpool, England; Mobile, Alabama.

Q. What did you do there?

A. They send me special to load some planes to Liverpool.

Q. Mechano decks? [394]

A. No, that was a different type of ship.

Q. But the mechano decks——

A. At Mobile, Alabama, was a mechano deck.

Q. How is that? A. Mobile, Alabama.

Q. Yes.

Mr. Harrison: Mr. Kay has taken upon himself to qualify this man as an expert on cross-examination. He wasn't introduced here as an expert, introduced as an eye witness.

Mr. Kay: Your Honor, this man has testified

(Testimony of Max Rosenstock.)

that he presumes to know that a plane could be landed without planks. We will find out how much he knows about it. Let us explore that. I can't see that Mr. Harrison has any complaint, came out on his direct examination; it is perfectly proper cross-examination.

Mr. Harrison: Asked him merely from the observation in this particular instance.

Mr. Kay: That calls for a conclusion, and the only way——

The Court: The objection will be overruled, counsel.

Q. (By Mr. Kay): Now, then, Mr. Rosenstock, in all those loading operations, that you observed, whether the Army did the work directly through employing stevedores, or through having a contracting stevedore, will you name one single instance where planes were loaded on mechano decks in which planking was used on top of the mechano deck? [395]

A. I believe once or twice that I know of.

Q. Out of how many times?

A. Out of quite a few times.

Q. Yes, out of hundreds of times; right?

A. Twice, I have seen that.

Q. What is the first time that you saw that?

A. Once at Anchorage 13?

The Court: Where is that?

The Witness: That is on the Bay.

Q. (By Mr. Kay): Who undertook to do that particular job?

(Testimony of Max Rosenstock.)

A. I mean the people used some timber, I don't remember the stevedoring company, who done that.

Q. They used some timber?

A. They used 2 by 12's, you know.

Q. 2 by 12's? A. That is right.

Q. Well, how many 2 by 12's did they use?

A. I think quite a few, I couldn't say exactly how many.

The Court: Do you know that of your own knowledge?

The Witness: That is right, sir.

Q. (By Mr. Kay): You say that, did you?

A. That is right, sir.

Q. What kind of planes were loaded on that occasion?

A. I'd have to look up, I couldn't remember the exact type.

Q. You don't remember the stevedoring [396] company? A. No, sir.

Q. It might have been either Jones or West Coast? A. Could have been anybody.

Q. You said those were the only two?

A. That is right.

Q. It would then have to be either Jones——

A. No, it couldn't have been West Coast, the Jones load outside piers, could be Jones.

Q. Could be Jones?

A. It could be Jones; it could have been Civil Service men. I don't remember exactly who it was.

The Court: Take a recess.

(Short recess.) [397]

(Testimony of Max Rosenstock.)

Q. (By Mr. Kay): You were showing some pictures there, Mr. Rosenstock. May I see them, please?

Mr. Harrison: Just a second, counsel, please. I would like to look at them.

Mr. Kay: We will both look at them, then.

Mr. Harrison: Not necessarily. They are not in evidence. They haven't been introduced.

(Photographs referred to were handed by the witness to Mr. Harrison, and by Mr. Harrison to Mr. Kay.)

Q. (By Mr. Kay): These pictures you have in your possession are pictures of planes of various types being loaded on a mechano deck, is that right, Mr. Rosenstock? A. Right, sir.

Q. And in all these you have got similar moveable athwartship—that is, fore and aft beams that you have on that model over there, isn't that right?

A. Right.

Q. And similar athwartship permanent beams that you have on that model?

A. They are not permanent. Each beam is moveable.

Q. I am talking about the others, athwartship?

A. Oh, on this model?

Q. Yes.

Mr. Harrison: These beams are moveable. That is the fore and aft beams. They are built so you can move them. [398]

A. Oh.

Q. (By Mr. Kay): So in these pictures, at least

(Testimony of Max Rosenstock.)

some of them, you have the same arrangement. You have got the moveable beams going one way and the permanent beams the other way?

A. That is right.

Q. And you show in these pictures a platform in which the tripod rests? Here is one right here (indicating).

A. There is one in the plane. This is a different type.

Q. But it has tripods and land on a platform like that model? A. That is right.

Q. And in this picture there is no planking other than the beams attached—that are normally on the mechano deck, isn't that right? A. Right.

Mr. Harrison: Just a second. Do the pictures show the plane after it is loaded or before?

Mr. Kay: Let's get that.

Q. (By Mr. Kay): When was that picture taken? A. It will be dated, sir.

Q. This is U. S. Army photograph 24 November, 1950, and the U. S. Navy ship machine San Gabriel. That is a tanker similar to the Shawnee Trail, isn't that right? A. That is right. [399]

Q. And this job was done about that time?

A. That is right.

Q. By whom? What stevedoring company did that? A. Jones Stevedoring Company.

Q. Jones Stevedoring Company? On this particular job was planking used when they put this plane on? A. No, sir.

Mr. Kay: We offer this in evidence, your Honor.

(Testimony of Max Rosenstock.)

The Court: Let it be admitted and marked next in order.

(Photograph was admitted into evidence as respondent-impleaded Jones' Exhibit B-1.)

The Witness: I am sorry, those don't belong to me.

Mr. Kay: You don't want me to have the rest of them?

The Witness: No, sir.

Mr. Harrison: You will have to give them to him if he wants them, Max. We will withdraw them.

The Witness: That isn't the same function as the other.

The Court: That isn't for you to determine.

The Witness: Oh.

Q. (By Mr. Kay): This time you referred to which you observed some timbers being used, you don't know the ship?

A. I don't remember the ship. It was at Pier 4, Oakland Army Base, the West Coast doing the loading. [400]

Q. West Coast Terminals?

A. That is right.

Q. You knew the West Coast Terminals did lots of loading, didn't you? A. That is right.

Q. And that is the only time you ever saw West Coast Terminals use planking? A. Yes.

Q. And that was just a couple of planks?

A. I don't remember how many planks, but that is the only time.

(Testimony of Max Rosenstock.)

Q. The only time?

A. That is the only time I have seen them.

Q. Yes. As a matter of fact, West Coast Terminals is doing all of the Army's—the loading on mechano decks for the Army right now, isn't it?

A. We aren't loading any.

Q. All right. When is the last time you did load any?

A. That would be about two years ago, I believe.

Q. Did West Coast Terminals do any of that?

A. Yes.

Q. And today the West Coast Terminals has a job for the Army, that is, in loading ships, is that right? A. That is right.

Q. In fact, that is the only stevedoring company that has [401] a contract with the Army today, is that right, in the Bay Area?

A. Well, I couldn't say for sure; I don't know.

Q. All right. After the accident happened, Mr. Rosenstock, did you have any conversation with anybody from Jones Stevedoring Company with respect to changing the loading methods of airplanes on mechano decks? A. No, sir.

Q. Did you make any suggestions of any nature to anyone with respect to changing the loading operations and the method of the stevedores with respect to planes on mechano decks? A. No, sir.

Mr. Kay: I think that is all.

(Testimony of Max Rosenstock.)

Redirect Examination

By Mr. Harrison:

Q. I have one or two other questions. Max, with regard to steadying these airplanes counsel has tried to intimate it is necessary to have something to hold onto to steady those? A. It isn't.

Q. Isn't it true you can just put your hands on the wing when it is suspended and pull it towards you or push it away?

Mr. Resner: I object to that——

A. When the plane—— [402]

Mr. Resner: Mr. Rosenstock, I was making an objection, do you mind? If your Honor please, I should like to object to the question as being leading and suggestive. This is Mr. Harrison's witness.

Q. (By Mr. Harrison): How can the steadying be done when you don't have a straight grab?

A. You don't have to get a straight grab on a plane when the plane is on a hook, just a light touch will steady it.

Q. Thank you. Max, when this plane fell, was it spotted over the platform at that time?

A. No, sir.

Q. How do you know it wasn't?

A. Well, I was there, sir. The other platform on the eye beam, you will find come down just approximate to be on the tripods, and then the plane is landed to the tripod, and the platform is lined up to land the plane.

(Testimony of Max Rosenstock.)

Q. Did the landing gear of the plane strike the platform as it fell?

A. It must have. Of course the damage was slight. I couldn't say for sure.

Q. Did it strike the platform?

A. No, it didn't strike the platform.

Mr. Kay: I am going to object to the question and ask that the answer to the last question be stricken on the ground that he doesn't know. He says, "It must have." If [403] he doesn't know, that answer should go out, and he couldn't possibly answer the next question.

Mr. Harrison: He can explain it, I am sure.

The Court: Let the question and answer go out, and you develop the facts, whatever they may be.

Q. (By Mr. Harrison): Did the landing gear strike anything?

Mr. Kay: I object, again, because he said he didn't know.

Mr. Harrison: He said he didn't know whether it struck the platform.

A. The landing gear—can I answer?

Mr. Harrison: I think so.

The Court: You may answer.

A. Struck the eye beam, one of the landing gears.

Q. (By Mr. Harrison): Struck an eye beam?

A. That is right.

Q. Did the plane go all the way down to the wings? A. No, sir.

Q. The wings struck the mechano deck?

(Testimony of Max Rosenstock.)

A. The belly was resting on the eye beams.

Mr. Harrison: I believe that is all.

Mr. Kay: May I ask one other question?

Recross-Examination

By Mr. Kay:

Q. What was the name of the walking boss [404] on the West Coast job in which you say you remember on one occasion they did use planking?

A. Sir, I don't remember the gangs.

Q. Who was the walking boss of the West Coast Terminals at that time?

A. I don't remember. I remember Mr. Linden was there.

Q. Linden? A. That is right.

Q. What date was that?

A. It must be a couple of years ago. I couldn't say the exact date. It was loaded at Pier 4, Oakland Army Base, under Mr. Linden.

Q. At Oakland Army Base, and it was about two years ago? A. About two years ago.

Mr. Kay: All right.

Mr. Harrison: I have one other question.

Redirect Examination

By Mr. Harrison:

Q. Mr. Kay asked if you gave any instructions to the stevedores or made any suggestions as to how they performed these loading operations, and your answer was no. A. Yes.

(Testimony of Max Rosenstock.)

Q. Will you tell us why?

Mr. Kay: I object to that as calling for a conclusion and opinion of the witness. [405]

Mr. Harrison: He can tell us why he didn't do something.

Mr. Kay: No, that is a conclusion. He is apt to say anything to that.

Q. (By Mr. Harrison): Was it your job?

A. No, sir.

Mr. Kay: It is incompetent, irrelevant and immaterial.

Q. (By Mr. Harrison): I withdraw the question and ask you this: Was it your job to make any such suggestion?

A. No, sir.

Mr. Harrison: That is all.

Recross-Examination

By Mr. Resner:

Q. Mr. Rosenstock, I observe Mr. Harrison has been addressing you by your given name, and I assume you are on good personal terms?

A. No, sir. I met the gentleman twice.

Q. Twice? When was the first time?

A. Some months ago at the Oakland Army Base.

Q. Under what circumstances?

A. Around the building. I don't remember the circumstances. Somebody introduced me, says, "Meet Mr. Harrison," and I met him.

(Testimony of Max Rosenstock.)

Q. At that time did you discuss the situation involved in this case?

A. No. He asked me once about it, about the accident, if [406] the man was badly hurt.

Q. When was that?

A. About two or three months ago, or four months.

Q. He asked you two or three or four months ago whether the man was badly hurt?

A. Whether he recuperated or something. I couldn't remember exactly, you know.

Q. He asked you whether the man was badly hurt two or three months ago?

A. Five—I couldn't say the exact time.

Q. Was there anything else in this conversation besides the seriousness of the man's injuries?

A. No, sir.

Q. Nothing else? A. Nothing else.

Q. When was the other time you talked with Mr. Harrison?

A. Then I seen the gentleman maybe—I couldn't remember the dates.

Q. Well, give me your best recollection.

A. Maybe two months or six weeks ago I run into Mr. Harrison at the Army base.

Q. Was that in connection with preparing in the trial of this case?

A. No, sir, had nothing to do with the trial.

Q. Did you know what kind of testimony was expected of you [407] when you came here today?

A. No.

(Testimony of Max Rosenstock.)

Q. How did you happen to bring the photographs with you?

A. I happened to have a plane, I took the pictures after loading, and when I came I brought them. I spoke to one of your boys and he was telling me it was coming up.

Q. One of whose boys?

A. His name is Dick——

(Last name inaudible to the Reporter.)

The Reporter: What was that last name?

A. Worked for the Jones Stevedoring Company.

Q. (By Mr. Resner): You were talking to him when?

A. Last Monday, and he asked me, "How come, Max, you are not in Court?" I said, "Why?" He said, "Ted Spirz was called on that case," and that is the reason I had these pictures and I brought them with me in case something come up.

Q. What, Mr. Rosenstock, did you expect to do with them? A. Nothing.

Q. Then why bring them?

A. I figured if these gentlemen never seen a mechano deck, want to see how a platform is built, I figured I will take the pictures so I can show them to the lawyers.

Q. You brought them up to educate us, is that it?

A. No education. I figured some counsellors have never [408] seen a mechano deck.

(Testimony of Max Rosenstock.)

Q. So on your own initiative you just thought it would be a nice idea to bring up these pictures to show us lawyers what it looked like?

A. Why not? Surely.

Q. I haven't seen them. Maybe I can learn.

A. Take a look.

Q. By the way, you made a report on this accident to the Army?

Mr. Harrison: I didn't hear that.

A. We made a report on the amount of damage to the plane.

Q. (By Mr. Resner): And you made a report on the circumstances of the accident?

A. No, sir.

Q. How many reports did you make, Mr. Rosenstock?

A. Made about four or five copies. You make on every damage.

Q. How many separate ones did you make?

A. None.

Q. One report? A. That is right.

Q. When did you make it?

A. Right after the ship—right after the accident.

Q. What does the report contain?

A. Just what the damage amounted to, the damage to the plane. [409]

Q. Only that?

A. Only that. That is my function. I have nothing else to do.

Q. Nothing as to how the accident happened?

(Testimony of Max Rosenstock.)

A. No, sir.

Mr. Resner: I should like to ask your Honor to direct the Government to produce Mr. Rosenstock's report.

Mr. Harrison: I don't have it. I never have seen it, but I will look for it. Do you have a copy of it, Max?

A. I don't have. I can bring it up. About $200 damage to the plane. We check on man hours, that is all we do.

The Court: You made a report to whom?

A. Just to our office.

The Court: Do you have a copy in the office?

A. I will check, sir.

Mr. Harrison: I don't know what other source I can go to, but I will do my best to have that report available.

Mr. Resner: All right.

Mr. Harrison: I believe that is all.

(Witness excused.)

Mr. Kay: Your Honor, please, we have a witness whom we have had here for a couple of days and had hoped to get him on by this time, and he tells me he has an important ship coming in in Seattle and would like to get away tonight, [410] so Mr. Harrison has agreed we may put him on out of order, and I presume you gentlemen will stipulate?

Mr. Harrison: Your Honor, please, I didn't realize at the time that I said it was all right that

the cross-examination of Mr. Rosenstock would take so long. I have two stevedores here under subpoena and I am sure the examination—my direct examination won't take more than two or three questions. If I may dispose of them first?

Mr. Kay: If we can do that, because I have——

The Court (Interposing): I will try to control the situation. There is no objection to him taking his witness?

Mr. Harrison: I object to him taking until four o'clock. I don't want to resubpoena these gentlemen.

The Court: We will direct them to come back, that will dispose of that.

Mr. Harrison: I think we can finish with them in five minutes.

The Court: If this witness has been here two days, maybe the longshoremen need to relax a bit and rest, so they may relax and we will call the witness counsel wishes.

Mr. Kay: Thank you, your Honor. Call Fred Nystrom.

FRED I. NYSTROM, JR.

called as a witness on behalf of the respondent-impleaded, Jones Stevedoring Company, [411] sworn.

The Clerk: State your full name to the Court?

A. Fred I. Nystrom, Jr.

The Court: Where do you live?

A. Seattle, Washington.

The Court: Your business and occupation?

A. Operating manager of a steamship company.

(Testimony of Fred I. Nystrom, Jr.)

The Court: What steamship company?

A. International Shipping Company.

The Court: How long have you been so engaged?

A. I have been in the steamship business actively for 29 years.

The Court: Briefly give me your experience during that period of time so I may have a general idea?

A. Well, I started in years ago, your Honor, on deck, spent some time on deck and in the engine room, clerical department; I have been a stevedore and trucked cargo around docks, worked in the holds, worked on gear; district superintendent for a steamship company in Alaska for four years, returned to the States in 1931; district superintendent of Puget Sound; assistant general superintendent of another company for several years; went into the service in late January of 1942; returned to the commercial steamship business in late 1945 as operating manager of the company that I was with prior to the war.

The Court: That is the occupation you are engaged in at [412] the present time?

A. Yes, sir.

The Court: All right.

Direct Examination

By Mr. Kay:

Q. When you went into the service, in what capacity did you serve?

A. I was asked by the Port Air Office, San

(Testimony of Fred I. Nystrom, Jr.)

Francisco Port of Embarkation, to come in as a civilian adviser.

Q. For what department of the service?

A. The operating department.

Q. Of the Army? A. No, the Air Force.

Q. Air Force? And you were employed, then, in a civilian capacity for how long?

A. Well, sir, I agreed to stay for two weeks, and that subsequently developed into two months; then the situation was so bad that I didn't have the heart to walk away and leave it.

I was at that time under commitment to go into the Navy. The Navy telephoned me the day after Pearl Harbor how long it would require to report. I told them at that time I could make it in about 15 minutes, and they told me they couldn't move that fast. And I later found my father was in a Japanese prison camp, so I asked permission of the Navy to go to see my mother, and passing through San Francisco [413] I made what I thought would be a social call to the San Francisco port of embarkation, and that fixed it. That is as far as I got.

Q. You finally found yourself as a commissioned officer in the Army Air Force, then, is that right?

A. As chief of operations, yes.

Q. What were your functions there?

A. At that time there was a Port Air Office at the San Francisco Port of Embarkation, at Fort Mason; subsequently changed to the Pacific Overseas Command, which of course is divided into the

(Testimony of Fred I. Nystrom, Jr.)
usual number of four divisions. I served as officer in charge of the operating division or operations division.

Q. And eventually your rank was increased to that of Lieutenant Colonel, is that right?

A. Right.

Q. Now, in connection with your service did you have to do with loading or supervising the loading of planes on mechano decks?

A. Supervision to the extent that the Air Force—may I explain that?

Mr. Harrison: Your Honor, may I interrupt and ask the Court to instruct the stevedores to return tomorrow morning so that they may leave now? Running like this, we will certainly last until four o'clock. [414]

The Court: Step forward, sir.

(Two prospective witnesses approached the bench.)

The Court: Will you be able to come back tomorrow?

A Prospective Witness: Yes, your Honor.

The Court: What about your associate?

A Prospective Witness: I don't know. My leg is bothering me too much, your Honor. I have neuritis.

The Court: We will make it very comfortable for you. All right, return tomorrow morning at ten o'clock.

Mr. Harrison: Thank you, your Honor.

(Testimony of Fred I. Nystrom, Jr.)

Q. (By Mr. Kay): Do you know where you were, Mr. Nystrom?

A. Well, yes, I think I can pick it up. Under our system of operations, your Honor, the Air Force, or this particular command that I was associated with, or served under, assumed the responsibility for all Air Corps materiel at the point of inception, or, shall I say, the place at which it was manufactured.

It was our responsibility to deliver it to the theatre in which it was required such being the case, this materiel, including airplanes, was brought into one of several Pacific Coast ports of embarkation. At that time it was tendered to the army transportation corps, and they in turn actually did the loading of it. I must not infer or cause anybody to believe that the Air Force superintended the actual loading because that was done by the transportation corps. [415]

Q. Did the Army Air Force have a representative aboard these vessels to at least inspect the planes being put aboard?

A. Each and every loading, yes, sir.

Q. And was that in connection with mechano decks? A. Yes, sir.

Q. These mechano decks were on tankers, is that right? A. Right.

Q. And that model you see over there, does that fairly represent the section of the deck, the mechano deck, of one of these vessels?

A. I would say so.

(Testimony of Fred I. Nystrom, Jr.)

Q. Now, what would you say is your estimate as to the total number of these ships that you observed in this loading operation, roughly?

A. Total number of loadings or mechano deck loadings?

Q. First, the number of vessels with mechano decks approximately?

A. I would say it was in excess of 150, possibly 200.

Q. And that would represent about how many planes actually loaded on mechano decks?

A. Three thousand.

Q. Now, Mr. Nystrom, I will ask you whether in any of those loading operations covering some three thousand planes, [416] whether you ever saw planking used by the stevedores, or whoever was loading the planes on board the mechano deck, upon the structure of the mechano deck?

A. Definitely not. [416-A]

Q. Let me ask you if in your experience of loading these planes the following description of a loading operation would be the usual and customary method of putting a plane aboard?

Mr. Harrison. Your Honor, please, this man didn't have anything to do with putting the plane aboard, himself, don't think he is qualified to testify to the usual and customary method.

Mr. Kay: Let me ask a couple more questions.

Q. Did you have charge of the entire Pacific Coast for the—on behalf of the Navy, or the Air

(Testimony of Fred I. Nystrom, Jr.)

Force in connection with the work that you have described?

A. Under the supervision of the commanding general, yes.

Q. Yes. And that took you from Seattle to San Francisco to Los Angeles, is that right?

A. Including Prince Rupert.

Q. Well, now did you have anything to do with designing any of the gear that was used to load planes on these mechano decks?

A. Considerable.

Q. What are some of the things that you designed?

A. Mustn't think that I designed, I assisted in designing.

Q. Participated in it?

A. In the tripods that, your Honor; at that time we were shipping largely P-38's, the landing gear is retracted, the tripod in affixed through a fulcrum gear, the all-steel tripod [417] on some of them rather than on its wheels.

Q. I will show you Libelant's Exhibit 14 and ask you if that is one of the things that you are talking about there, showing here this tripod that is resting on a platform on the mechano deck?

A. Yes, only I worked in connection with this, —this plane was developed after the war was over, I had no experience in handling this particular plane. However, this appears to be an adaptation of the tripod we developed here during the war.

(Testimony of Fred I. Nystrom, Jr.)

Q. Thank you. Now, in connection with landing a plane that has one of these tripods——

Mr. Harrison: I object to this line of questioning, he just said that he has never had anything to do with this particular type plane or tripod, not qualified to testify here.

Mr. Kay: Let me ask a couple more questions and maybe Mr. Harrison will be satisfied.

Q. This tripod that is shown on this plane resting on this platform here, will you state whether or not that is substantially the way these planes, these other types of planes you had were loaded on mechano decks? A. Right.

Q. As you see it in this picture here, the tripod on that platform, is that substantially the manner in which these [418] planes were rested and secured upon the mechano deck? A. Yes.

Q. Regardless of the type of plane they were. And when you—would there be any difference in the, any substantial difference in putting either that type of plane aboard or some other type where you had to use a barge with a crane alongside and bring the plane over on to the mechano deck and then land it down, that is land the tripods down on these platforms?

Mr. Harrison: I object to that, your Honor, on the ground that this witness has testified he doesn't know anything about the loading of this particular type of plane and can't compare it with the loading with any other type.

The Court: Are you familiar with this type at the present time?

(Testimony of Fred I. Nystrom, Jr.)

The Witness: Of the plane, sir?

The Court: Yes.

The Witness: No, I have not seen that particular plane.

The Court: That is the plane itself?

The Witness: Yes. In other words, that was manufactured after I left the service.

The Court. All right. What kind of planes are you familiar with?

The Witness: P-40's, P-47's, P-38's.

The Court: In relation to their weight and length and breadth, are they substantially the same as these? I mean, [419] from the standpoint of loading?

The Witness: Oh, yes, the problem is basically the same.

The Court: Proceed.

Q. (By Mr. Kay): Now, then, I will ask you, Mr. Nystrom, whether or not the following description of the landing of one of these planes is the customary and usual method that was used during your experience which, by the way, was over what period of years? A. 1942, 1943 and 1944.

Mr. Harrison: Your Honor, please, I would like to interpose an objection, perhaps I could ask one or two questions on voir dire?

The Court: You may.

Q. (By Mr. Harrison): Did they have this particular plane during the time you were familiar with the loading operations?

A. They weren't being shipped.

(Testimony of Fred I. Nystrom, Jr.)

Q. Were the P-38's shipped with the engines in or out? A. In.

Q. In other words, they were substantially heavier, were they not? A. P-38's?

Q. Yes. A. Yes.

Q. Were there any other planes shipped without engines that you had anything to do with? [420]

A. Oh, a few salvage jobs that were being returned from the theatres, from action, but not planes shipped from the States.

Q. The salvage jobs would not be shipped on mechano decks or tripods, just thrown in the best way possible? A. Every way, shape or form.

Q. Is it true that you have never had anything to do with loading an airplane which is nothing but the fuselage and the wings?

A. Yes, I believe that's right.

Mr. Harrison: With that answer, your Honor, I object to any further testimony of this witness on this line of questions.

The Court: Going to the weight of the testimony in landing these planes on the tripods.

Mr. Harrison: I submit, your Honor, that must be an entirely different problem.

Mr. Kay: No, no. This witness has testified it is substantially the same.

The Court: I am so limited, I wouldn't think, but it is pointed out to me—you have had some experience?

The Witness: Sir, the problem is much the same on all of them, basically.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Without knowing, that would be my thought. I may be mistaken.

The Witness: Your Honor, may I say that you have in [421] substance two different problems. You have got, number one the tripod, I mean, the tricycle gear, which is the nose wheel and the two main landing wheels, alternately you have two main landing wheels with a tail wheel, the only difference is the third wheel, which is on the back on one and in the other is on the front. But as to the balance of the operation it is the same.

Q. (By Mr. Kay): Mr. Nystrom,——

The Court: Are you going to get back to Seattle? If you are you better liven it up.

Mr. Kay: Maybe he will need a plane—well, he is taking a plane, anyway. If I can keep Mr. Harrison down for about two more minutes——

Mr. Harrison: That is the most unjust remark from that particular individual I have ever heard. I object to it, you have been up and down like a jackrabbit.

The Court: Both of you are violating the rules. Proceed.

Mr. Resner: I want your Honor to notice that I have had nothing to say.

The Court: Let us get through, gentlemen, please.

Q. (By Mr. Kay): Mr. Nystrom, of course you have seen operations where they take, with a barge alongside the tanker, and using a heavy crane, lift them over the deck and set them down, right?

(Testimony of Fred I. Nystrom, Jr.)

A. That is the principal method, that they were loading in [422] San Francisco and Los Angeles areas during the war.

Q. All right. Once you take a plane over the deck and bring it down to position where it is about to be landed, where the—and I am speaking now, you have in mind this plane, although you didn't work on this particular type of plane, but you say the operation is substantially the same, and that plane is held still over the spot, the approximate spot where the tripod is to be landed on that platform, will you state whether or not it is the customary and usual practice of the stevedores to hold onto the strut as it is being guided into position down on its final resting place?

Mr. Harrison: I object, your Honor, please, on this ground: Mr. Kay in his hypothetical question has assumed something not in evidence here, the plane wasn't spotted over the platform at this time. The witness cannot testify as to something that is not in the record.

Mr. Kay: All right, your Honor, I have it here.

Mr. Harrison: I believe your Honor will recall Mr. Rosenstock just testified it was not.

Mr. Kay: That is your evidence; we have got evidence to the contrary.

Mr. Harrison: Your Honor will also recall the libelant testified that the wings came all the way to the mechano deck. I submit if the landing gear had hit the spot over the platform it would have

(Testimony of Fred I. Nystrom, Jr.)

hit the platform, the wings would not have [423] gone to the mechano deck.

Mr. Kay: May I read this testimony, and it is very short, your Honor. This is on page 237 of the transcript of March 19.

"Q. (By Mr. Kay): Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and ahold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck, is that correct?

"A. That is correct."

Now, your Honor, I submit that is our evidence. Maybe your Honor won't believe it, but we are entitled to put on any evidence in this record, to submit that to the witness and ask him whether in his experience this was the customary and usual practice of the stevedores.

Mr. Harrison: Your Honor, please, may I finish, Mr. Kay, I have something to read from yesterday's record. May I read my recross-examination on that point? I asked Mr. Luehr:

"Q. Did you have the platform with you that was going to be underneath the wheel?

"A. The platform already was underneath there.

"Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform? [424] A. No, sir.

(Testimony of Fred I. Nystrom, Jr.)

"Q. Were you going to fasten it?

"A. No, sir.

"Q. You were there to steady it, is that right?

"A. That is right."

In other words, Mr. Luehr's testimony was that he wasn't there to put the landing gear on the platform.

Mr. Kay: That is qualified with this, your Honor: Naturally at that moment he couldn't put the bolt on the platform or—that is not inconsistent at all, that is in connection with this testimony of Mr. Luehr's that the next succeeding operation—this is all a part of it—at that particular time that he had ahold of the strut, obviously he couldn't be putting the bolts in, couldn't be doing those things in the steadying process, and that has been described by Mr. Spirz as well as Mr. Luehr, was that at this point that this plane was held still to bring it down to its final resting place and in doing that job, to steady the plane, these tag lines were no longer of any use, weren't used and the man had to hold onto something solid that he could guide it down, at the same time seeing the tripod, coming down on that platform. It is as clear as that, your Honor.

Mr. Harrison: I submit, your Honor, Mr. Luehr's testimony, Mr. Rosenstock's testimony, in the facts of the case whereby the plane came all the way down and struck, the wings [425] on the mechano deck, clearly demonstrate that they were not at the moment that Mr. Luehr was injured

(Testimony of Fred I. Nystrom, Jr.)

over the platform, nor were they at that moment ready to fasten the bolts or anything in regard to the platform. It is at that particular moment we are involved with. Mr. Kay is trying to get from this witness testimony regarding the next thing to be done. I submit that is entirely irrelevant.

Mr. Kay: No, that isn't it, your Honor. I said that is a part of the process.

The Court: The Court is prepared to rule, you can argue the case at the proper time; I will give you a record. Overruled.

You understand the question?

The Witness: No, sir, I don't recall it.

Q. (By Mr. Kay): Let me reframe it, then. After this plane is brought to a standstill over the deck, over the approximate area on which it is to be landed, that platform down there, you follow me on that, don't you? Is that the way it is done up to that point, get it up in the approximate area where you are going to land it on the platform, is that correct?

A. You are speaking now of this particular plane or of any plane?

Q. Well, let us take any plane in any operation.

A. Yes, that is correct.

Q. In other words, you can't take it with the crane and just [426] put it right down on that spot, can you? A. No.

Q. You get it to a certain position and somebody has got to be there to see it is going on down

(Testimony of Fred I. Nystrom, Jr.)

exactly as it can be on that exact spot, isn't that correct? A. That is right.

Q. And in the course of doing that, somebody has to be there, somebody has to hold on to that plane, isn't that correct? A. That is right.

Q. And you can't do that with tag lines? Is that correct? A. Correct.

Q. Is it the usual and customary practice so far as your experience goes that stevedores do hold onto the plane to get it down to that spot after it is held still and it is over the approximate place it is to be landed? A. Right.

Mr. Kay: That is all.

Cross-Examination

By Mr. Harrison:

Q. What is your name, sir?

A. Nystrom. I seemed to have acquired a San Francisco throat since coming down here.

Q. Mr. Nystrom, you have stated that you have never operated on one of these loading operations where the planes had the engines out, is that [427] true?

A. I meant to indicate that I have never loaded any planes from the States going out, I have handled planes that came back from the various theaters that had the engines out.

Q. But they were not—were they loaded on mechano decks with tripods?

A. Some of them, yes.

Q. Can you state whether or not—strike that.

(Testimony of Fred I. Nystrom, Jr.)

Can a plane with an engine in it that is suspended from a hook be steadied as easily as a plane, a light plane, just the wings and the fuselage and no engine?

A. Would you mind restating that, please?

Q. Certainly. Can a plane with an engine in it, let us take for instance, a P-38; they have two engines, do they not? A. Yes, sir.

Q. Yes. Let us say a plane with an engine or two engines in it, can it, when suspended on the cargo hook before the landing operation be steadied as easily as a plane where only the wings and the fuselage are being landed?

A. I would say it could.

Q. You don't think that the weight of the engine or anything would contribute to the difficulty in steadying the plane?

A. No, to the contrary. I think if the engine is in it, and the tail assembly is on, you have a set-up plane, you have a better balance, and with a better balance your ability to steady it, as you call it, and I am not too sure what you mean [428] by the word "steady," but your ability to control the movements of that plane would be better.

Q. Now, from your observation of all these thousands of loadings you have testified to, is it in your opinion necessary for a man to stand underneath that airplane before it reaches the platform upon which it is going to be rested?

A. You say reaches the platform. You mean by the time it is landed on the platform?

(Testimony of Fred I. Nystrom, Jr.)

Q. I mean by the time the landing gear itself is directly above the platform.

A. But not on the platform?

Q. Not on the platform.

A. If you are going to get that plane down where you want it, it seems to me you are going to have to, on certain types of airplanes, to get a man under there.

Q. Let me ask you this: Is it necessary for a man to get under there before the landing gear of the plane arrives at the spot over the platform?

Mr. Kay: Just a moment. I object to that as not within the direct examination, and incompetent, irrelevant and immaterial. There is no evidence in this case that this man was under this plane before it got over that platform.

Mr. Harrison: I submit, your Honor, that the man himself testified that it wasn't yet ready to be over the platform. Mr. Rosenstock testified that the landing gear wasn't over the [429] platform——

Mr. Kay: That isn't the question.

Mr. Harrison: I asked——

The Court: Aren't we concerned to the period of time when it stopped before it fell?

Mr. Harrison: Yes, your Honor, but I think the facts will reveal from Mr.—the crane operator's testimony, Mr. Bailey, that the movement which he was about to do at the time that the plane fell was to boom down. Now, it was also brought out in that testimony that booming down wasn't going to lower the plane, he was going to hold the plane

(Testimony of Fred I. Nystrom, Jr.)
up and boom down for the purpose of swinging it across the deck.

The Court: Well, not what he is going to do, but what happened and what was done is what we are concerned about, and our problem here, it seems to me, is from the period of time it stopped until it actually occurred.

Mr. Harrison: What I am getting at, your Honor, where was it stopped?

The Court: Well, the testimony shows about three feet.

Mr. Harrison: Three feet above the platforms, above the mechano deck, but where in relation to these platforms is what I am getting at.

The Court: Yes.

Mr. Harrison: My contention is that until the plane arrived at a spot over these platforms, there was no necessity [430] for the men to go beneath it.

The Court: Well, there is testimony, too, in relation to the weather, the wind, and the necessity of getting this—described here, not only of the plane, to guide it, but to guide it over wherever they were trying to land it on the platform.

Mr. Harrison: Of course, that testimony was from Mr. Spirz. Your Honor, there is contrary testimony.

The Court: That is the reason I am allowing this testimony in the fashion I have, can't limit it to one or two witnesses, have to use all.

Mr. Harrison: I think the facts themselves, your Honor, illustrate that the plane had not yet ar-

(Testimony of Fred I. Nystrom, Jr.)

rived at a point over these platforms. Had it been over the platforms when it fell, the landing gear would have struck the platform and not have gone all the way down.

The Court: I don't think that without knowing whoever is operating this thing to land it on the platform can make that kind of a job out of it without the guidance of whoever is responsible, responsibility it is to guide it on those points, the three—— [431]

Mr. Harrison: That is true, but those platforms are of considerable width, and it is our contention that they had not arrived to the point where they had to guide the landing gear onto the tripods of the platform.

The Court: Our problem here, what you are trying to do is to determine whether or not it is necessary for him to go under it?

Mr. Harrison: At the particular time, yes, sir.

The Court: All right, ask the direct question.

Mr. Harrison: All right.

Q. Assuming that the plane has not arrived at a point where with direct fall the tripods, I mean the landing gear, would have to be fastened to the platform—in other words, assuming that the landing gear are, say, still two or three feet away from the platform, is it at that time necessary for a man to go underneath the platform?

A. That would depend upon the type.

Mr. Kay: I want to note my objection for the record, same objection previously made.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Overruled.

The Witness: I would say, Mr. Harrison, that that is entirely contingent on the type of plane you are talking about.

Q. (By Mr. Harrison): You don't have any familiarity with this particular type of plane?

A. It could be it would be necessary on some type of planes [432] that we handled during the war the entire handling of the plane was underneath. Possibly I might enlarge, your Honor. That tripod that they use might be like my glasses, and it has one pin, that pin goes through a collar, such as Rosenstock was trying to depict, the heavier planes goes through a fulcrum gear, the construction of the thing, it isn't an equilateral triangle, sometimes that tripod will come down at this angle (demonstrating).

The Court: On one——

The Witness: On one side. Other times it will come down this way, or a lesser angle, have to get a firm landing, have to get that flat on the platform. If you don't, you are not only going to break the tripod, but damage the airplane.

The Court: And taking a step further, that is for the purpose of locking it in there?

The Witness: That is right.

Q. (By Mr. Harrison): Let us make it clear, however, that until the tripod arrives over the platform, none of that operation takes place, is that true?

A. Not entirely so, some types of planes they

(Testimony of Fred I. Nystrom, Jr.)

put the tripods on after they are positioned over the platforms.

Q. In some operations they put the tripods on first?

A. Some operations they are put on at Sacramento before they come down here.

Q. But to be—to make it clear, to the best of your [433] knowledge, it is not necessary for a man to go under there to do anything with the tripods until it arrives over that platform, is that right? A. Yes.

Mr. Harrison: Thank you.

Redirect Examination

By Mr. Kay:

Q. Mr. Nystrom, when you bring this plane over to the approximate area, you don't know within a matter, sometimes of maybe one or two feet, is that right, where it is finally going to rest; correct? A. Correct.

Q. And so the men that are doing this job, whether or not it is exactly over that, would still have to go out and get hold of that plane to help guide it down there, is that correct?

A. Correct.

Q. Why wouldn't you use planking on this type of a deck, a mechano deck?

Mr. Harrison: I object to this, your Honor, this man is not a stevedore, not a safety expert, not qualified to testify on that subject.

(Testimony of Fred I. Nystrom, Jr.)

The Court: Goes to the weight of the testimony. I will allow it. Overruled.

The Witness: Your Honor, I would say that the use of planking on this type of a deck would constitute a very [434] serious hazard, a serious hazard not only to life, but a serious hazard to the airplanes. In the first place, on that lower deck you have many obstructions. You have men, during the normal course of operations of a tanker, you have men walking up and down there, the messrooms, the quarters, some of them are amidship, more or less traffic in there. You get a span of ten or twelve feet, whatever it is, allowed for the handling of these planes. You would have to use about three-inch planking, and a three by twelve plank, twelve to fourteen feet long, is very heavy. The natural inclination, if you provide planks to work on, would be for some of the men to use them, some wouldn't. The result would be that the man walking around that deck would assume that he had a place to walk on, possibly walk backwards, and there wouldn't be any plank there.

Secondly, those beams, you have no stoppers on them, so therefore a plank over the top of it would be a free agent, you might say, could be firmly placed on this side or maybe it won't be. The man steps on the other end, down the plank goes, and down the man at the same time.

The danger of men, assuming that they had a plank to walk on, would preclude itself from any sensible operation, I take it.

(Testimony of Fred I. Nystrom, Jr.)

Recross-Examination

By Mr. Resner:

Q. I have one question. Are you intimating that it would be less safe with an area to walk on than merely [435] the six or eight inch beams?

A. I very definitely am.

Redirect Examination

By Mr. Kay:

Q. Would you explain why, Mr. Nystrom?

A. Furthermore, in getting those planks out from underneath the planes, they would have to be raised to begin with before they could be moved. You always have projections there between all the airplanes, sometimes the vertical clearance from the top of that deck and the lower part of the airplane is very, very little. You have men raising those planks and moving them. Heaven only knows what shape your airplane is going to be in when you are through with it.

Recross-Examination

By Mr. Resner:

Q. Also true, Mr. Nystrom, if you laid them on top of the movable beams you would have to take the planks off every time you wanted to move the beams in order to find a place to put the little wooden platforms? A. Yes.

Q. And if you laid them on the solid beams which run athwartship you would have to move

(Testimony of Fred I. Nystrom, Jr.)
the beams also in order to—if you had to move the movable beams or move the solid beams, so whichever way you would have to move them, you would have to move them every time you moved the beams? A. That is right.

Q. There would also be the danger of dropping the planks on [436] the men below as well as the danger of the men walking on the planks above?

A. That is right.

Mr. Harrison: Is this cross-examination?

Mr. Resner: Well, Mr. Harrison, the army, the government built that ship——

Mr. Harrison: Your Honor, I ask that Mr. Resner stop arguing this case.

The Court: The jury is absent.

Mr. Resner: Thank you, sir; I am through.

Recross-Examination

By Mr. Harrison:

Q. Mr. Nystrom, you don't seem to think much of putting planks over here. I might ask you what you would think of—I am talking about the safety of the men, Mr. Nystrom. I noticed that you said that the planes, there were objections because they might damage the plane. We are not concerned here with that, we are concerned here with the safety of the men.

Now, I might suggest to you, would it be possible to sling platforms with either iron hooks or lines so that the platform would, say, be four or five feet, two or three feet in width, a painter's

(Testimony of Fred I. Nystrom, Jr.)

platform, a sling, a painter's platform underneath the mechano deck—let me describe it with this pencil.

For instance, take lines from the end of the planks or [437] walking boards and just sling it down below here (indicating)—the pencil is not long enough, but I think you understand what I am talking about, make this a safe walkway down here. Would that not facilitate the operation and lessen the danger of men being struck by the plank?

A. No, to the contrary, I think it would be a greater hazard.

Q. You don't think that would lessen the danger of men being struck by an airplane? A. No.

Q. You explain that, please?

A. May I go to the model?

The Court: Certainly.

The Witness: This model, your Honor, is one side of one-half of the ships which we are talking about. This area in here, generally speaking on these ships you have a maze of projections. Most of these ships are equipped with what they called a Butterworth system. It is a steam cleaning device and there are many small hatches so that this equipment can be used so that the men can get down to these tanks and work in there. Tanks and tankers are divided up into a great number of tanks, each of which have a means to getting to them. Therefore, in addition to all the pipe lines that are running forward and aft, all of the valves,

(Testimony of Fred I. Nystrom, Jr.)

and some of them are very large valves, plus the hatches, you would have nothing but a series of obstructions. [438]

Q. I have worked on a tanker, Mr. Nystrom, I know what they look like.

A. Therefore, if you have scaffolding over here it is going to be less than the height of the men.

Q. Then your objection to the scaffolding would be that a man might strike his head while walking on the main deck, is that it?

A. That would be one of the objections.

Q. I asked you whether or not it would make a man less apt to be struck by an airplane. What is your answer to that?

Mr. Kay: What position, Mr. Harrison?

Q. (By Mr. Harrison): From standing on the platform.

Mr. Kay: On the platform, his head is above the mechano deck.

Mr. Harrison: Yes, it would necessarily have to be so.

The Court: You understand that question?

The Witness: Yes, I do, but I see no reason to believe that it would be any easier to put a man on scaffolding where he would have to stand above the mechano deck than have him on the main deck.

Q. You don't believe so? A. No.

Q. Did you ever hear of a man ducking?

A. Yes.

Q. How long have you been down here in San Francisco, Mr. Nystrom? [439]

(Testimony of Fred I. Nystrom, Jr.)

A. Monday forenoon.

Q. And did you come down solely for the purpose of testifying in this case? A. I did.

Q. And how long ago were you contacted by Mr. Black or Mr. Kay?

A. Oh, I would say a couple of weeks ago, possibly three.

Q. And they are paying you for your services, are they not? A. I hope so.

Q. Are they paying you by the day?

A. I don't know, I haven't discussed payment with them.

Q. You assume they are paying you by the day, are you not?

Mr. Kay: This is getting argumentative, now, your Honor.

The Court: Just like the lawyers are getting paid.

Mr. Harrison: These lawyers getting paid.

Q. But you came down here solely for the purpose of discussing this with Mr. Black and testifying, is that true? A. That is right.

Q. How did Mr. Black contact you?

A. By telephone.

Q. Did he discuss the matter at some length with you on the telephone? A. No. [440]

Q. Just asked you to come down and discussed it with you here?

A. Discussed it briefly, yes, asked me if I would be willing to come down and I told him I would.

(Testimony of Fred I. Nystrom, Jr.)

Q. Since you have been here how much has he discussed it with you?

A. During the recesses.

Q. You haven't been to Mr. Black's office?

A. Yes, I was in Mr. Black's office for about fifteen minutes on Monday.

Q. I see.

Mr. Harrison: I believe that is all, your Honor.

Mr. Kay: Believe me, this is just one question.

The Court: What is that?

Mr. Kay: This will only be one question.

The Court: You get that, Mr. Reporter?

The Reporter: Yes, sir.

The Court: All right, proceed.

Q. (By Mr. Kay): When Mr. Harrison asked you whether it would be more dangerous there I think you did say it would be more, and then he wanted to know why if you had a lot of planking and didn't have open space in the event something did happen, why would it be more dangerous if you had a lot of planking on here covering this area instead of the open spaces in the event a plane came down, and assuming he had [441] time to jump out of the way——

Mr. Harrison: Assuming the man is under the plane. As I pointed out at the beginning of today's examination, Mr. Kay has got the wrong idea.

Mr. Kay: I haven't the wrong idea. You are trying to give His Honor the wrong idea.

Mr. Harrison: Well, the argument is not the safety with planking under the plane, the argument

(Testimony of Fred I. Nystrom, Jr.)
is whether or not with planking he would have had to go under the plane.

Mr. Kay: Well, what has that got to do with this question?

Mr. Harrison: He keeps pushing that theory as mine.

Mr. Kay: If I had a theory that was no good at all, I could still ask the man a question about it.

The Court: Do you understand the question?

The Witness: Will you restate the question, please?

Q. (By Mr. Kay): Why would it be more dangerous, and you answered this, Mr. Harrison wanted to know, and you got into some other discussion; if you had planking, as the Government contends you ought to have on this mechano deck surface, why would that be more dangerous than if you leave the mechano deck as it was designed, and as they loaded all these ships without using planks, in the event some plane came down and a man couldn't get out of the way, or wanted to get away from there?

A. Well, for the simple reason the planks have never been used. [442] In other words, the way that deck is set up now, in case an airplane gets away or in case of accident it is a very simple matter to drop down through the beams and drop to the lower deck, but with planking on there you are not going to get out of the way.

Mr. Kay: That is all.

(Testimony of Fred I. Nystrom, Jr.)

The Court: You say you wanted to ask one more question?

Mr. Harrison: I would like to have him here tomorrow, but I don't think I will. I would like to make—no, that is all.

Mr. Kay: That is all. Thank you, Mr. Nystrom.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

The Crier: This Court will adjourn out of respect to the memory of Daniel C. Murphy, Sheriff of the City and County of San Francisco.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Friday, March 21, 1952.) [443]

March 21, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States, further trial.

Mr. Harrison: The last witness called was one of Mr. Kay's witnesses that was called out of order. I would like to now call one of the two stevedores which were under subpoena. Call Mr. Green, please.

FRANK DOUGLAS GREEN,

called as a witness on behalf of the respondent, U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): State your full name, please?

A. Frank Douglas Green, your Honor.

(Testimony of Frank Douglas Green.)

Q. You are not nervous, are you?

A. A little bit.

Q. Where do you live?

A. 315 Victoria Street, San Francisco.

Q. What is your business or occupation?

A. Stevedore.

Q. How long have you been so engaged?

A. About twenty-two years, your Honor.

Q. On the waterfront here? A. Yes.

Q. All during that period of time?

A. Yes. [444]

The Court: Proceed, counsel.

Mr. Harrison: Thank you, your Honor.

Direct Examination

By Mr. Harrison:

Q. Do you recall on July 28th, 1950, whether or not you were working aboard the U.S.N.S Shawnee Trail? A. Yes, I do, sir.

The Court: It will be necessary to speak up so the Reporter can hear you. The Reporter has to take down everything you say.

A. All right, your Honor.

Q. (By Mr. Harrison): Were you employed aboard the Shawnee Trail on that date, July 28th, 1950? A. Yes, I was.

Q. Do you recall that during the course of loading planes aboard that vessel a man was injured?

A. He was.

Q. Do you remember the man's name?

A. Mr. Frank Luehr, I believe.

(Testimony of Frank Douglas Green.)

Q. Can you tell us what you were doing at the time of the injury, Mr. Green?

A. I was steadying the plane down to the superstructure deck.

Q. Where were you? Were you on the main deck of the vessel or the mechano deck? [445]

A. Mechanical deck, sir.

Q. You were on the mechano deck?

A. Yes, sir.

Q. Just what were you doing to steady the plane as it came down?

A. I had hold of the wing.

Q. Hold of the wing? Were there other men aboard the plane, Mr. Green?

A. I guess there was. I didn't see them all. There was some around there.

Q. How many would you estimate there were?

A. I would say four or five. There have to be four or five to do the job.

Q. Did this plane fall, Mr. Green?

A. Yes, I would say it dropped down.

Q. And what did you do when the plane dropped?

A. I just stepped out of the way. I was just lucky enough to step out of the way.

Q. Why could you step out of the way?

A. I stepped back toward the forward part of the bridge house on the port side.

Q. What did you step back onto, do you remember?

A. Part of the superstructure, I guess it was.

(Testimony of Frank Douglas Green.)

Q. Was it the catwalk?

A. I believe it was. [446]

Q. Then you were standing—were you standing on a beam at the time you were steadying this airplane? A. Yes, I was.

Q. When it fell, you stepped back to the catwalk, is that correct? A. Yes.

Q. Did you have hold of anything on the plane other than the wing? A. No, I didn't.

Mr. Harrison: I believe that is all, your Honor.

The Court: Any questions?

Mr. Resner: No questions, Judge.

Mr. Kay: No questions.

Mr. Harrison: Thank you, that is all.

(Witness excused.)

Mr. Harrison: I will call Mr. Ingbrigtsen, please.

MARTIN INGBRIGTSEN

called as a witness on behalf of the respondent, U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): How are you feeling today?

A. Not so hot.

Q. Sit back there and make yourself comfortable. What is your full name?

A. Martin Ingbrigtsen. [447]

Q. Spell that last name for the Reporter.

A. I-n-g-b-r-i-g-t-s-e-n.

Q. Where do you live?

A. 2966 23rd Street.

Q. What is your business or occupation?

(Testimony of Martin Ingbrigtsen.)

A. I am a stevedore.

Q. How long have you been so engaged?

A. Oh, about forty-five years.

Q. Where? A. On the waterfront.

Q. Here on the waterfront?

A. In San Francisco. Never left it.

Direct Examination

By Mr. Harrison:

Q. Are you still a stevedore?

A. Yes, when I am able to work.

Q. What kind of work do you do?

A. I am stevedore boss.

Q. Gang boss? A. Yes, gang boss.

Q. Do you recall if you were a gang boss with a gang that was sent out by the Jones Stevedoring Company to load the U.S.N.S. Shawnee Trail on July 28th, 1950? A. I were.

Q. You were? A. Yes. [448]

Q. Were you employed as a gang boss on that day? A. Yes, sir.

Q. And was there a man named Frank Luehr in your gang? A. Yes, sir.

Q. Do you recall whether or not Mr. Luehr was injured on that day?

A. Well, I didn't see the accident. I was watching the plane coming down, and it stopped and all of a sudden it dropped, and I got out of the way, got one of the beams over me. If I stood where I was I would have had the same as he had, almost.

Q. Were you on the main deck?

(Testimony of Martin Ingbrigtsen.)

A. I was on the main deck, yes.

Q. What were you doing on the main deck?

A. I had to be down there to see what was going on. Mr. Spirz, our walking boss, told me to send a man up there.

Q. The walking boss told you to send a man up there?

A. Yes, and this gentleman, he was nearest to me, so I asked if he would go up there, please.

Q. Just before the accident happened, Mr. Luehr was standing near to you on the same deck, is that correct?

A. Yes, he was on deck, yes, but when the plane come in I told him to go up and steady it.

Q. You told him to go up and steady the plane?

A. That was orders from Mr. Spirz; get a man up there. [449]

Q. Pursuant to orders from Mr. Spirz?

A. That is right.

Q. Did Mr. Luehr go up there?

A. He did.

Q. Did you watch what he was doing when he got up there?

A. He was standing by to steady the plane when it come down.

Q. He was standing by to steady the plane?

A. Yes. He had to get some blocks to put underneath the plane.

Q. Do you recall whether or not when the plane dropped it had been centered over the platforms?

A. No, right over the—supposed to come down.

(Testimony of Martin Ingbrigtsen.)

Q. But it hadn't come down yet?

Mr. Kay: Just a moment. I object to that as leading and suggestive, and the witness has just answered that it had. He said it was over that spot.

Mr. Harrison: I believe that wasn't his testimony, your Honor.

The Court: It is leading and suggestive.

Mr. Harrison: Yes. I withdraw the question.

The Court: It may go out.

Q. (By Mr. Harrison): Do you remember how many men were assisting in this steadying operation?

A. Well, I couldn't say exactly. Approximately above five. [450]

Q. About five? A. Yes.

Q. Were there any other men injured when the plane fell? A. No.

Mr. Harrison: I believe that is all.

Cross-Examination

By Mr. Resner:

Q. Mr. Ingbrigtsen, Mr. Luehr was working there where he was supposed to be, was he?

A. Either him or somebody else.

Q. Either him or somebody else?

A. Yes. We had to have the man there.

Q. You had to have a man there?

A. Yes, sure.

Q. Mr. Ingbrigtsen, tell me, how old are you?

A. I am—I was seventy two weeks ago.

(Testimony of Martin Ingbrigtsen.)

Q. You have been working on the waterfront now for 45 years? A. Yes.

Q. Tell me, there is a pension plan down there now, Mr. Ingbrigtsen, that gives the men $100 a month? A. Oh, yes.

Q. You are on the plan, aren't you?

A. Yes.

Mr. Harrison: I object to this as beyond the proper scope of the direct examination. [451]

Mr. Resner: I will make him my witness for that. I want to show there is a pension plan.

The Court: You better prepare——

Mr. Resner: Just want to question him on cross-examination, then I will make him my own witness.

The Court: Very well.

Q. (By Mr. Resner): Mr. Ingbrigtsen, Mr. Luehr was working on your gang, wasn't he?

A. Yes.

Q. Tell the Judge what kind of workman Mr. Luehr was, about his ability?

A. He was a good workman.

Q. Did he follow all the orders?

A. He did.

Q. Was he conscientious? A. Yes.

Mr. Resner: All right. Now, Judge, may I make Mr. Ingbrigtsen my witness for the purpose of asking him several questions about the pension plan?

Mr. Harrison: Your Honor, please, libelant has rested his case. If he wants to call witnesses, I don't think he is entitled to.

(Testimony of Martin Ingbrigtsen.)

Mr. Resner: The man is here. Rather than call him back—just take a matter of a minute or two.

Mr. Harrison: I don't believe he could call him back. [452] He has rested.

Mr. Resner: I could call him on rebuttal.

The Court: Keep in mind this gentleman has some difficulty, and he has been here twice and he would like to dispose of it.

Mr. Harrison: I have no serious objection, your Honor. I thought maybe Mr. Ingbrigtsen would like to get off the stand and go home.

Mr. Resner: Three questions won't make it too hard. May I proceed?

The Court: Yes.

Direct Examination

By Mr. Resner:

Q. Mr. Ingbrigtsen, tell me about this pension plan down there now, what it gives the men, and what kind of service you have to have in order to get it?

A. Well, you get $100 a month, and then if you make the thirty hours a week you get under social security.

Q. In other words, the $100 a month pension plan is on top of whatever you get from social security, is that right? A. That is right.

Q. This pension plan is available to men who have worked in the industry for 25 years?

A. That is right.

(Testimony of Martin Ingbrigtsen.)

Q. So you, having worked there many years more than that, are eligible to that? [453]

A. Yes.

The Court: Are you on pension now?

A. Not until after the 1st of July.

The Court: The 1st of July you go on pension?

A. Yes.

The Court: Where were you born?

A. Born in Norway.

The Court: I wish I were as rugged and strong as you are right now.

Mr. Resner: Thank you very much.

The Court: Step down.

Mr. Harrison: Thank you, Mr. Ingbrigtsen.

(Witness excused.)

Mr. Harrison: If your Honor please, I would now like to call Mr. Elzey.

FAY S. ELZEY

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): What is your full name?

A. Fay S. Elzey.

Q. Where do you live?

A. 137 Carmel Street, San Francisco.

Q. Your business or occupation?

A. I am assistant chief of the procurement division, San [454] Francisco Port of Embarkation, at Fort Mason.

Q. And just what activity are you engaged in

(Testimony of Fay S. Elzey.)

in relation to your work? What is the nature of it?

A. We do all the purchasing for the Port and execute contracts for all types of services to stevedores.

The Court: All right.

Direct Examination

By Mr. Harrison:

Q. Did you hold this position on January 1st, 1950, Mr. Elzey? A. Yes.

Q. Who is your immediate superior, Mr. Elzey?

A. Mr. C. E. Higbee. He is the chief of the division.

Q. I show you, Mr. Elzey, what purports to be a contract between the Jones Stevedoring Company and the United States, effective date of January 1, 1950, expiration date of December 31st, 1950; and I ask you if you can identify the signatures on that contract?

Mr. Kay: Your Honor, I made the statement to counsel before, and I will make it again, to facilitate the trial of this case, that we will stipulate that that is the contract that was in force at the time of the happening of the accident.

Mr. Harrison: I will accept that stipulation, then, your Honor.

The Court: Very well. [455]

Q. (By Mr. Harrison): Mr. Elzey, do you have anything to do with the computation of rates that are paid under this contract?

A. Yes. Mr. Higbee does the negotiation, and

(Testimony of Fay S. Elzey.)

when he has arranged the negotiation and determined the rates, I actually compute the rates.

Q. How are the rates computed, Mr. Elzey?

A. The contract provides for payment to the stevedoring contractor on what we call a commodity basis.

The Court: Commodity basis?

A. Commodity basis.

The Court: What do you mean by commodity basis?

A. We pay the contractor so much per ton for loading different classes of cargo.

The Court: I see.

A. And tonnage rates are arrived at by determining the cost of a longshore gang for one hour; and to this direct cost is added an overriding percentage to compensate the contractor for his expenses, plus an allowance for profit.

Q. (By Mr. Harrison): Then in effect it is a, although not technically a cost-plus contract, in effect it amounts to that, is that right?

A. That is what it is. Pay the contractor's expenses plus a certain amount for profit, yes.

Q. I see. Now, you say that you do work in computing these costs, is that right? [456]

A. Compute contract rates, yes.

Q. In these costs, is there included cost of insurance covering the stevedores' operations?

A. In the overriding percentage there is an allowance for what is known as payroll insurance, which is the workman's compensation insurance,

(Testimony of Fay S. Elzey.)

State, and workman's compensation insurance, Federal.

Q. So that in effect, Mr. Elzey, the Government, who pays Jones Stevedoring Company under this contract, in effect pays the premiums on that insurance, is that correct?

A. They pay the stevedore contractor money with which him to pay the premiums, yes, sir.

Q. I call your attention, Mr. Elzey, to Section——

Mr. Harrison: Oh, if your Honor please, I may interrupt at this time to introduce this contract into evidence under the stipulation.

The Court: It may be received and marked.

Mr. Harrison: And I ask that the original may be introduced, but, gentlemen, I ask that the original may be withdrawn and a mimeographed copy substituted.

The Court: It may be admitted and marked.

(Mimeographed copy of contract referred to was admitted into evidence as Respondent U.S.A. Exhibit B.)

Q. (By Mr. Harrison): I call your attention, Mr. Elzey, to Section 14-(c) of the contract appearing on page AB-8-7-1, and [457] I will read the provisions of Section 14(c) 1 and 2, and ask you whether or not these provisions, to your knowledge, were complied with.

Mr. Kay: Your Honor, please, I object to that as incompetent, irrelevant and immaterial; no

(Testimony of Fay S. Elzey.)

proper foundation laid; and the contract speaks for itself and is the best evidence, and he is asking this witness for his conclusion and opinion on a matter that is in evidence.

Mr. Harrison: If your Honor please, the provisions of the contract which I am about to read are provisions which require the Jones Stevedoring Company to take out certain forms of insurance.

The Court: Pardon me, your question is asking this witness if the contract was complied with in that regard?

Mr. Harrison: Yes.

The Court: That is a conclusion. You must develop the fact.

Mr. Harrison: He has with him the insurance certificates, your Honor, which indicate that.

The Court: All right, develop the facts, whatever they may be.

Q. (By Mr. Harrison): I will read this portion of the contract to you, Mr. Elzey, and then question you on it.

Mr. Harrison: Section 14(c) provides:

"The contractor shall, at his own expense, [458] procure and maintain during the terms of this contract, insurance as follows:

"(1) Standard workmen's compensation and employers' liability insurance and workmen's and harbor workers' compensation insurance, or such of these as may be proper under applicable state or federal statutes. The contractor may, however, be self-insured against the risks in this paragraph:

(Testimony of Fay S. Elzey.)

"(1) If it has obtained the prior approval of the contracting officer. This approval will be given upon receipt of satisfactory evidence that the contractor has qualified as such self-insurer under applicable provisions of law.

"(2) Bodily injury liability insurance in an amount of not less than $50,000 any one person, and $250,000 any one accident or occurrence."

Q. (By Mr. Harrison): Now I ask you, Mr. Elzey, did you in the course of your duties as contracting and procuring officer down at Fort Mason, receive any evidence of the contractor's compliance with these requirements of the contract?

A. Yes, sir, certificates of——

The Court: What is the answer?

A. Yes, sir.

The Court: Keep in mind the Reporter. [459]

A. Certificates of insurance were filed by the Jones Stevedoring Company showing that they carried the Federal and State Compensation insurance.

Q. (By Mr. Harrison): Were these certificates mailed to your office? A. Yes, sir.

Q. Would you state what the certificates provide?

Mr. Kay: Well, the certificates speak for themselves.

Mr. Harrison: They are not in evidence yet.

Mr. Kay: Well, that is a thing to put in. Whatever the certificates are, that is what they forwarded to him. We are not denying——

The Court: Does he have them?

(Testimony of Fay S. Elzey.)

Mr. Harrison: Yes, he has them.

The Court: Have you the certificates there?

A. Yes, your Honor.

Mr. Harrison: I have asked him what they provide, your Honor.

The Court: What do they provide?

A. One certificate covers, "Workmen's Compensation, Employers' Liability Policy, all operations of the assured under the Longshoremen's and Harbor Workers Compensation Act."

The certificates show that Jones Stevedoring Company as the assured under the policy. The policy was issued by [460] the Firemen's Fund Insurance Company. The certificate is signed by E. A. Eckworth, authorized agent of the company.

This certificate shows that the policy covers all operations of the assured under the Longshoremen's and Harbor Workers' Compensation Act. It shows that the policy has been endorsed. "In the event of cancellation the company agrees to give thirty days prior notice to the party to whom this certificate is issued.

It also shows that the policy has been endorsed. "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy."

The certificate shows it is issued to the purchasing and contracting officer, San Francisco Port of Embarkation, Fort Mason, California.

(Testimony of Fay S. Elzey.)

The other certificate shows it was a policy issued by the same company to Jones Stevedoring Company, and it shows that the policy covers usual manufacturers and contractors form of public liability policy. It shows that the policy was endorsed.

"Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against [461] the United States of America which it might have by reason of payment under the policy."

The certificate shows that the policy provides thirty days prior notice will be given before cancellation. This certificate is issued to the purchasing and contracting officer, San Francisco Port of Embarkation, Fort Mason. It is signed by E. A. Eickworth, authorized agent.

Q. (By Mr. Harrison): Thank you, Mr. Elzey. Now, from those certificates does it appear that the United States is an assured under those policies in any way?

Mr. Kay: Well, your Honor, the certificates speak for themselves. He is asking for an interpretation here. I was trying to stipulate we have done all these things. That policy, the certificate was issued and the policy did exist at that time. That is all this gentleman would testify to.

Mr. Harrison: That is the first time that stipulation has been offered.

Mr. Kay: I told you that before the case started.

(Testimony of Fay S. Elzey.)

The Court: There is a nervous tension going on here. Proceed.

Mr. Harrison: Yes. Well, never mind. I would ask that these be admitted in evidence as respondent's next in evidence.

Mr. Kay: No objection. [462]

Mr. Resner: May I look at them?

The Court: They may be admitted and marked next in order.

(Certificates referred to were admitted into evidence as respondent U.S.A. Exhibits C and D respectively.)

RESPONDENT'S EXHIBIT C

No. C1 .....

Compensation Certificate of Insurance

This is to certify that the following described Workmen's Compensation and Employers' Liability Policy, covering as stated, has been issued by the Firemen's Fund Indemnity Company:

Policy No.: PL-40257.

Name of Assured: Jones Stevedoring Company.

Address: 311 California Street, San Francisco, Calif:

Commencement: January 6, 1950.

Expiration: January 6, 1951.

Specific location covered: State of California.

Description of Operations or Work Covered: Usual Manufacturers and Contractors form of Public Liability Policy.

(Testimony of Fay S. Elzey.)

Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all right of subrogation against the U. S. of America which it might have by reason of payment under the policy.

The Company agrees in the event of cancellation to give 30 days prior notice to the party to whom this certificate is issued.

In event of any material change in or cancellation of said policy, the Fireman's Fund Indemnity Company will make every effort to notify the party to whom this Certificate is addressed of such change or cancellation but the Fireman's Fund Indemnity Company undertakes no responsibility by reason of any failure to do so.

Dated this 6th day of January, 1950.

Issued to: Purchasing and Contracting Officer San Francisco Port of Embarkation.

Address: Fort Mason, California.

FIREMAN'S FUND
INDEMNITY COMPANY.

By /s/ E. A. EICKWORTH,
Authorized Agent.

[Endorsed]: Filed March 21, 1952.

(Testimony of Fay S. Elzey.)

RESPONDENT'S EXHIBIT D

No. C1 .....

Compensation Certificate of Insurance

This is to certify that the following described Workmen's Compensation and Employers' Liability Policy, covering as stated, has been issued by the Fireman's Fund Insurance Company:

Policy No.: LS-752.

Name of Assured: Jones Stevedoring Company.

Address: 311 California Street, San Francisco, California.

Commencement: January 6, 1950.

Expiration: January 6, 1951.

Specific location covered: Territorial waters—State of California.

Description of Operations or Work Covered: All operations of the Assured under the Longshoremen's and Harbor Workers' Compensation Act.

In event of cancellation, the Company agrees to give 30 days prior notice to the party to whom this certificate is issued.

Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all right of subrogation against the United States of America which it might have by reason of payment under this policy.

In the event of any material change in or cancellation of said policy, the Fireman's Fund Insur-

(Testimony of Fay S. Elzey.)

ance Company will make every effort to notify the party to whom this Certificate is addressed of such change or cancellation but the Fireman's Fund Insurance Company undertakes no responsibility by reason of any failure to do so.

Dated this 5th day of January, 1950.

Issued to: Purchasing and Contracting Officer San Francisco Port of Embarkation.

Address: Fort Mason, California.

FIREMAN'S FUND
INSURANCE COMPANY.

By /s/ E. A. EICKWORTH,
Authorized Agent.

[Endorsed]: Filed March 21, 1952.

Mr. Resner: Those of course are two separate policies, aren't they, Mr. Harrision?

Mr. Harrison: Yes, they are. One covers the workmen's and harbor workers' accident and the other one the liability policy.

Mr. Resner: Where the word "company" is used in those certificates, the company referred to is the Firemen's Fund Insurance Company, is that correct?

Mr. Harrison: Well, I believe as Mr. Kay says, the documents will speak for themselves.

Mr. Kay: Well, let's stipulate that is a fact.

(Testimony of Fay S. Elzey.)

Mr. Harrison: I do not enter into such a stipulation.

Mr. Resner: I think it is necessary in order to clarify it for your Honor.

The Court: Wait a minute. The contract will have to speak for itself.

Mr. Harrison: I believe that is all, Mr. Elzey.

Mr. Kay: No questions.

Mr. Resner: No questions. [463]

(Witness excused.)

The Court: Unless there is some ambiguity or something I can't anticipate at this time?

Mr. Resner: My only thought was this: The word "company" has been used sometimes loosely as between the Jones Stevedoring Company which was doing the work, and the Firemen's Fund Insurance Company which insured Jones? These insurance policies which were provided by Jones are insurance policies which were issued by the Firemen's Fund Insurance Company.

The Court: I don't think there is any question about that.

Mr. Kay: I don't think so.

Mr. Resner: No, but we just wanted to be clear about that, your Honor.

Mr. Harrison: I would like now to call Mr. Patterson.

Mr. Kay: Are those the records of the Commission?

Mr. Harrison: Yes.

Mr. Kay: We will stipulate the records Mr. Harrison has here are the official records of the United States Compensation Commission.

Mr. Magana: We join in the stipulation. You can read any portion of them, from our point of view, Mr. Harrison, and if you tell us what you want them to say we will even agree to [464] that.

Mr. Harrison: Well, just a second and I will see how I feel about that.

The Court: I will take a recess for a few minutes so you can check it.

Mr. Harrison: Thank you, your Honor.

(Short recess.)

Mr. Harrison: Your Honor, please, in the absence of Mr. Patterson, whom I understand will be here at two o'clock, I would like to call Mr. Schmitz.

Mr. Resner: Here is Mr. Patterson now, Mr. Harrison.

Mr. Harrison: Well, in that event maybe we can dispose of Mr. Patterson's testimony.

Mr. Kay: We offer to stipulate, again, they are the official records of the United States Employees' Compensation Commission.

Mr. Harrison: I would like to still obtain some information from Mr. Patterson.

The Court: Very well.

DANIEL M. PATTERSON

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): Your full name, please?

A. Daniel M. Patterson.

Q. Your business or occupation? [465]

A. I am an examiner with the Bureau of Employees' Compensation.

Direct Examination

By Mr. Harrison:

Q. How long have you had that occupation, Mr. Patterson?

A. About 15 years, approximately.

Q. As such do you have under your jurisdiction the file copies of various compensable injuries suffered by one Frank Luehr? A. I have.

Q. Did you bring those files with you?

A. These files are here.

Q. Will you tell us very quickly, in a general way, the nature of the injuries received and the dates thereof?

Mr. Resner: If your Honor please, the records are the best evidence; Mr. Patterson, I am sure, has no independent knowledge, and if the records go into evidence, and we stipulate they may be admitted in evidence, Mr. Harrison can read them.

Mr. Harrison: We have not yet submitted them.

Mr. Resner: We will stipulate they can be put in evidence.

(Testimony of Daniel M. Patterson.)

Mr. Harrison: Maybe I don't want to, Mr. Resner.

Mr. Resner: We can save time. We agree they can go in evidence and agree you can read [466] them.

Mr. Harrison: Doesn't make too much difference. I think on the cross-examination of Mr. Luehr we got that pretty well straight, anyhow.

Q. (By Mr. Harrison): Can you tell from the records, Mr. Patterson, on this most recent injury of Mr. Luehr's, can you tell whether or not compensation is being paid?

A. Compensation is being paid.

Q. And can you tell what firm or insurance company is paying it?

A. The Firemen's Fund Insurance Company is paying compensation.

Q. Now, Mr. Patterson, the Compensation Commission usually classifies injuries into four different classifications: Partial temporary, total temporary, partial permanent and total permanent, is that correct? A. That is correct, sir.

Q. Asuming that Mr. Luehr in this case has a partial permanent disability, what would be the maximum that he could receive under the Compensation Act?

Mr. Resner: If your Honor please, I am going to object to this question and this line of questioning upon the ground that the statute, of which the Court will take judicial knowledge, is obviously

(Testimony of Daniel M. Patterson.)

the best evidence: Title 33, Section 901, and following, the United States Code.

Mr. Harrison: If your Honor please, all I am trying to [467] do is get these matters before the Court and save the Court the trouble of wading through all these statutes.

Mr. Resner: I submit, your Honor, the most expeditious way of going about this—counsel, I will stipulate the Longshoremen's and Harbor Workers' Act says what it does, and it is here in the book before me and it is in the Judge's chambers and it is in the Circuit Court Library.

Mr. Harrison: Let me borrow your section.

Mr. Resner: That is Section 933. Do you want the benefit section?

Mr. Harrison: I want the section that sets the maximum at $11,000.

Mr. Kay: Wouldn't it facilitate this, I will stipulate that that is so.

Mr. Harrison: Then perhaps we can dispose of it.

Mr. Resner: Yes, we will stipulate to that, Judge.

Mr. Harrison: If the man has what they would classify partial permanent disability, that the maximum which he is entitled to under the Longshoremen's and Harbor Workers' Compensation Act is $11,000, is that the stipulation?

The Court: Is that stipulated, gentlemen?

Mr. Resner: Yes. And I will ask Mr. Harrison to stipulate that if he has total disability and got

(Testimony of Daniel M. Patterson.)

compensation he would get $35 a week for the rest of his life.

Mr. Harrison: I will not stipulate to that. [468]

Mr. Resner: But these benefits are unrelated to the right to sue a third party under Section 933.

Mr. Harrison: If you think I am going to stipulate to that, Mr. Resner——

Mr. Resner: Isn't that in the law just as much the total partial?

Mr. Harrison: That is not my interpretation of the law and I would not stipulate the man is entitled to $35 a week.

Mr. Resner: Then I withdraw my stipulation and submit to your Honor the law speaks for itself and your Honor will take judicial notice of it.

The Court: I will. It is my duty to do so.

Mr. Harrison: All right, your Honor. Then I would like, pursuant to the stipulation, to introduce the record into evidence.

The Court: No objection? Let it be admitted and marked.

(Record referred to was admitted into evidence as Respondent U.S.A. Exhibit E.)

Mr. Harrison: That is all, thank you.

The Court: Any questions?

Mr. Kay: None at all, your Honor.

Mr. Magana: May I ask a question?

(Testimony of Daniel M. Patterson.)

Cross-Examination

By Mr. Magana:

Q. Do these records you gave the Clerk [469] just now constitute all the records and the total file you have on Mr. Luehr?

A. That is correct, to the best of my knowledge.

Q. And they will indicate how much time he lost from work insofar as the Commission would know it on account of the specific injuries?

A. That is correct.

Mr. Magana: All right, thank you.

(Witness excused.)

Mr. Harrison: I will now call Mr. Schmitz.

ANDREW F. SCHMITZ

called as a witness for the respondent U.S.A., being first duly sworn, testified as follows:

Q. (By the Court): Your full name, please?

A. Andrew F. Schmitz—S-c-h-m-i-t-z.

Q. Where do you live?

A. 1208 Sanchez Avenue, Burlingame, California.

Q. What is your business or occupation?

A. Safety consultant, United States Department of Labor, Bureau of Labor Standards, Federal and Maritime Safety Section and Pacific Coast Section.

Q. What is the nature of your work?

A. Promotional and advisory in regards to accidents and prevention of accidents and minimizing injuries. [470]

(Testimony of Andrew F. Schmitz.)

Direct Examination

By Mr. Harrison:

Q. What other safety work have you had during the course of your lifetime, Mr. Schmitz?

A. I was regional safety supervisor for the Waterfront Employers' Association of the Pacific Coast, the Puget Sound and Columbia River District, from April, 1943, through November, 1945. Prior to that I was deputy commissioner for the United States Employees' Compensation Commission under the Longshore and Harbor Workers' Compensation Act, 15th District, Honolulu, T. H., October—rather, November, 1940, through October, 1941.

Prior to that I was manager of the Accident and Prevention Department and Personal Injury Claims and Accident Prevention Department, Castle and Cookes Terminal, Limited, Hawaii.

From October, 1941, through April, 1937. Prior to April, 1937, I was secretary of the Industrial Accident Board, City and County of Honolulu, through 1927, from 1927 through 1924 I was inspector, city and county of Honolulu Industrial Accident Board.

The Court: What are you presently?

A. Official of the Department of Labor, Bureau of Labor Standards, since November, 1945.

The Court: All right.

Q. (By Mr. Harrison): It is safe to say you have been [471] connected with safety work and

(Testimony of Andrew F. Schmitz.)

accident prevention work the greater majority of your life? A. That is correct.

Q. In the course of your previous employment and present employment, do you come in contact with the Pacific Coast Maritime Safety Code?

A. I do.

Q. Are you thoroughly familiar with the provisions of that Code? A. I am.

Q. In the course of your experience have you had occasion to familiarize yourself with a superstructure built on tankers, which is commonly called a mechano deck?

A. I have seen the vessels carrying such superstructures, yes.

Q. Would you say that model over there would fairly accurately represent what you have seen?

A. I think it is a good representation of a mechano deck.

Q. And in the course of your work have you had occasion to familiarize yourself in a general way with operating practices involved in stevedore operations on all sorts and types and descriptions—in a general way?

A. Well, in a general way, yes.

Q. In the course of your present employment, what do you do when an accident is called to your attention and you take [472] the facts under surveillance? What is your course of operation?

A. We do not investigate accidents, specific accidents, as such. We have available to us, all of those injuries that are reported to the deputy commis-

(Testimony of Andrew F. Schmitz.)

sioner under the Longshoremen's and Harbor Workers' Compensation law to cover all Maritime employment under that Act, and have available all the injuries reported under the Federal Employers Compensation Act of 1916 to cover the injuries under that Act.

We review these injuries and determine the accident causes. We prepare studies and make recommendations for accident prevention and injury prevention, minimizing the seriousness of injury, and such work as that kind.

Q. I see. You prepare studies of the methods to use?

A. Well, in preparing the studies we determine the corrective measures that we are going to recommend, by seeking out all accident circumstances that relate to the conditions, methods, acts, involved in the particular accident relating to inherent as well as potential matters. [473]

Q. I see. Do you have a short phrase that you use for that particular——

A. Well, we—well, we cause analyze the accident.

Q. You cause analyze an accident?

A. We cause analyze an accident.

Q. I see. Well, then, Mr. Schmitz, just to demonstrate to the Court what the cause analysis is let me give you a state of facts and see if you will run an exemplary causal analysis on it. Let us assume that some sort of a heavy unit of cargo is being loaded on one of these mechano decks and

(Testimony of Andrew F. Schmitz.)

that the cargo has been lowered by shoreside or floating crane to within several feet of the mechano deck; let us further assume that while this cargo remains suspended on a bridle or hooked to a fall of the crane it becomes necessary to steady the swing of this heavy cargo and guide it in to a particular resting place on this mechano deck. You follow me so far? A. I do.

Q. Now, let us assume that the man in charge of the stevedoring gang employed to load this cargo then asked one of his men or directed someone to walk out on one of the beams of the mechano deck to steady and guide that cargo as it was coming in or as it was stopped in that position, and that this man then went out on the mechano deck, onto the deck itself without the aid of walking boards or platforms, and [474] he stood on the beams of the mechano deck with his hands on this cargo. Follow me so far? A. I do.

Q. Let us assume further that while this man is poised on this mechano deck the operator of the crane which is holding this suspended cargo leans forward in the cab and looks out of the window and accidentally catches his sleeve on the gear that holds the cargo suspended, that the cargo drops to the mechano desk striking the man poised on the beam, knocking him eventually to the main deck and injuring him.

Now, assuming first of all that there are no mechanical defects in the barge, let us eliminate that from your causal analysis, assume there is no me-

(Testimony of Andrew F. Schmitz.)

chanical defect in the barge or the equipment, will you run as best you can from this short question a hypothetical causal analysis on that? A. Yes.

Q. On those state of facts.

A. We would go first to the source, the initial source of the accident, that is, the accident initially started on the derrick barge. Assuming that there is no mechanical defection on the barge or its gear or equipment, we would then determine that supervision of the operator of the derrick would need to be improved. In other words, we would expect the supervisor to not permit men to operate if they had loose, floating garments that could hook up on projections [475] that might cause a loss of control.

We would expect the workmen to come properly clothed to prevent such an accident.

We would then consider the load that was suspended from the cargo hook and the method in which it was being handled, and we would consider or we would recommend that the load be handled either by guide lines manner in such a way so that the workmen manning the guide lines so that in lowering the load or positioning the load would not be unnecessarily exposed to the hazards, to the accident-producing circumstances in that type of an operation.

We would like to, we would probably recommend—well, let us say we would recommend that the men, if practicable, remain on the main deck in order to handle the tag lines until the load was in position for lowering and placing.

(Testimony of Andrew F. Schmitz.)

If that were impracticable we would recommend that they be stationed on platforms on the main deck so that when it became necessary to handle the load they could handle it from shoulder height without unnecessarily exposing themselves to a suspended moving or swinging object.

If that were impracticable we would recommend that step-up platforms, probably designed for the purpose suspended from the beams be used. And if these were not available we would recommend that they use scaffolding across the fore and after or thwartship beams to provide a safe [476] footing for the men engaged in the operation of steadying and landing the load so that in the event of any unforeseen incident the men would have an opportunity to get to cover.

Q. I see. Then from that casual analysis would you say that the failure to provide safe footing in the hypothetical question which I have given you was one of the contributing causes in this injury?

Mr. Kay: Just a moment. I object to that as incompetent irrelevant and immaterial, no proper foundation laid, calling for the conclusion and opinion of the witness and the fact that the facts of this accident were not fully related to the witness.

Mr. Harrison: In what manner, Mr. Kay?

Mr. Kay: Well, for one thing the question assumed that this load was up several feet from the deck. Now, obviously if it was up suspended overhead, where the man couldn't handle it, the load, it is one thing; if it is down to the level of shoulder

(Testimony of Andrew F. Schmitz.)

high where the men could handle it, that is another.

Mr. Harrison: I took the precaution of writing the question out and reading it very carefully to avoid such an objection. The question supposed that the load had come down to where the men could get their hands on it.

Mr. Kay: You said several feet, and you can't get your hands on the load in several feet, might be seven feet up [477] in the air.

Mr. Harrison: Then I will certainly add that particular fact to the question that the load is down within shoulder height of the man.

Q. Would that change your answer at all, change your causal analysis of the accident?

Mr. Kay: The rest of our objections, your Honor, are made again to this same question, even in that reframed——

The Court: I suggest you reframe your question.

Mr. Harrison: The whole hypothetical question, your Honor? [478]

The Court: I suggest to you that you reframe your question. I will sustain the objection so the record is clear.

Mr. Harrison: Would you read the last question, Mr. Reporter?

(Record read by the Reporter.)

Q. (By Mr. Harrison): Well, put it this way, Mr. Schmitz: I was merely trying to clear up what the witness said, I believe, in his causal analysis,

(Testimony of Andrew F. Schmitz.)

He said that they would recommend some kind of safe footing for these men.

The Court: I understand.

Mr. Harrison: That was merely the point I was trying to get at, that he found in his causal analysis that the failure to provide this was one of the causes——

The Court: To provide what?

Mr. Harrison: Safe footing for the men to work.

The Court: Establish the facts of what is a safe footing in the conditions existing here.

Q. (By Mr. Harrison): You recommended, you say you would recommend under this hypothetical state of facts that some sort of a platform be slung from the beams, is that correct?

Mr. Kay: Just a moment. I object, your Honor, on the ground the hypothetical question is still not complete, and in fact it omits very important factors here. Counsel wants to know—I have no point here in trying to propose the [479] hypothetical question for him, that is his function—but there are many factors here as to the condition of the barge, the vessel, the sea, and the particular type of load. All of those factors is a part of the case here. I mean, he is just giving him a general situation.

Mr. Resner: Also the fact, your Honor, that on these tankers, and the reason they have the mechano deck structure is because on the main deck there are tank tops, pipelines, other things that require the mechano deck over it. That prevents the lowering

(Testimony of Andrew F. Schmitz.)

of the plane on the deck itself. The very construction of the vessel is a primary factor in this whole situation.

Mr. Harrison: As far as a mechano deck on a T-2 tanker, the man is familiar with them, and familiar with the mechano deck.

Mr. Kay: No proper foundation as to whether he has been aboard this particular type with the kind of equipment underneath the mechano deck. I think there is no proper foundation. I make that objection, I made it before, and I renew it again here.

Mr. Harrison: I submit the man testified he has observed this situation.

The Court: You can lay a better foundation.

Q. (By Mr. Harrison): Have you, during the course of your experience, Mr. Schmitz, observed mechano decks built on what [480] we commonly call T-2 tankers? A. I have a few.

Q. I see. A. Not many.

Q. Have you observed that on the main deck of the vessel there are frequently many superstructure obstructions, tank tops, and oh, I imagine winches, pipelines, that sort of thing on the main deck?

A. There are many projections on the deck.

Q. Yes.

Mr. Harrison: Your Honor, Mr. Kay's objection to the hypothetical question which I have posed seems to me to be entirely spurious. He has suggested that I go all over the details about what kind of a barge it was and what kind of a rig they were

(Testimony of Andrew F. Schmitz.)

using, and what time of the day it was, and how old Mr. Luehr was, which is presently inconsequential. I think I have outlined a very fair question from what the evidence has shown.

The Court: I don't question your fairness at all.

Tell me, have you had occasion to familiarize yourself with the unloading and loading of these airplanes?

The Witness: To answer the question specifically, no, I have not, familiarized myself with the loading or unloading of airplanes on that particular type of a vessel.

The Court: On any other kind of a vessel? [481]

The Witness: Many, yes, all types.

The Court: With this outlined here, are you familiar with that?

The Witness: Yes, sir, I have seen ships equipped with such superstructures.

The Court: Similar in character?

The Witness: Yes, sir.

The Court: Proceed.

Mr. Harrison: Thank you, your Honor.

Q. Now, to get the record straight, Mr. Schmitz, in your causal analysis of this accident, would you for us sort of boil it down to one or two or three main contributing causes?

Mr. Kay: Pardon me, your Honor, I am going to object to the form of the question, and also on the ground it is incompetent, irrelevant and immaterial, that no proper foundation has been laid, and that it would call for the conclusion and opinion of

(Testimony of Andrew F. Schmitz.)

this witness on a matter with which he obviously wouldn't be qualified as an expert.

Mr. Resner: May I offer an objection? I don't like to interrupt here, but frankly what Mr. Harrison is trying to get the witness to do is to assume the Court's function and decide the ultimate fact that is before the Court.

The Court: Embodied in the examination here, the witness, if I followed it, and I will stand corrected, he made recommendations under certain conditions existing. [482]

Mr. Resner: That is correct, I have no objection to that, Judge, but when Mr. Harrison says boil it down to one or two or three causes——

Mr. Kay: That is right.

Mr. Resner: He is asking the witness to explain why the accident happened, but that is what we are handing up to your Honor to decide.

Mr. Kay: That is why I objected to the form of the question.

Mr. Harrison: Your Honor please, I anticipated that particular objection, took the trouble to do a little research on the matter. I believe that it is perfectly all right for an expert in safety to testify as to what, in his opinion, were the causes of the accident.

The function of the Court is to determine whether or not any of these causes were brought about by negligence.

Now, I am not asking the witness to testify whether or not there was negligence in this case,

(Testimony of Andrew F. Schmitz.)

I am asking him to cause analyze the accident. That is his business, and he is an expert in what causes accidents and I am asking him to testify on that particular point. He is not to testify to the Court's ultimate, the ultimate issue which is before the Court as to whether or not the accident was caused by any negligence on the part of anyone. I submit——

The Court: If I followed your argument, as far as he [483] went, he indicated that what he would recommend under certain conditions, and you might go that far here.

Mr. Harrison: I see. Well, I will then rephrase the question this way.

The Court: Do I make myself clear?

Mr. Harrison: Yes, your Honor.

Q. Assuming the facts which I have related to you, Mr. Schmitz, woud you recommend that some form of safe footing be provided in this operation?

A. I would.

Mr. Kay: Just a moment. Your Honor, I am going to object on the ground it is incompetent, irrelevant and immaterial; that no proper foundation has been laid specifically in that the witness couldn't possibly be qualified to testify with that, your Honor, to that question for the very reason that he has stated he has never seen any loading operations on a mechano deck.

Now, your Honor did ask him whether he had seen other types of loading, but this case is going to turn on the situation involved in the mechano

(Testimony of Andrew F. Schmitz.)

deck and the loading on main decks, or in between decks, in the lower holds, couldn't be comparable to this situation.

The Court: I will answer you now. You interrogate the witness.

Mr. Kay: If counsel is finished, I certainly will be [484] glad to.

Mr. Harrison: Certainly not.

The Court: Well, you're making an objection, I want to get him into the record within reasonable limits; I don't want to do violence to the law. But I am not altogether satisfied that if he is not familiar with the conditions existing here, might go to the weight of his testimony, but for example, let us hear the question. Will you read the question?

(Question read by the Reporter.)

Mr. Kay: There, your Honor, what operation? He has described a certain operation. This gentleman obviously has never seen that operation. To be sure, you may ask him a hypothetical question for an answer of that sort if you lay all of the proper foundation. I don't think he knows now what the conditions were under which this loading operation was undertaken.

The Court: Well, I am going to do what I usually do on these matters, going to allow the testimony to go in subject to your motion to strike and over your objections. That will give you a proper opportunity to cross-examine him, if you want to.

(Testimony of Andrew F. Schmitz.)

Mr. Kay: Thank you, your Honor.

Mr. Harrison: Thank you, your Honor.

Q. Then your answer to that question was you would recommend [485] some safe footing be provided? A. That is correct.

Q. Could you give us in more detail the particular type of safe footing?

Mr. Kay: So that the record may be clear, my objection will go to this entire line of questions.

The Court: Let the record so show.

Q. (By Mr. Harrison): What particular type would you recommend?

A. In making such recommendations we are generally guided by the minimum standards for safety that prevail in the state where the recommendation would be made.

The minimum standard for safe footing in the State of California would be a width of three feet so that I would expect the planking to be at least three feet wide with a sufficient overhang on the lateral beams supporting it so that there would be no danger of it sliding off, and I would expect the planking to be adequately secured so that it could not shift. And if there were danger of the men falling off that mid-rails and top-rails, if necessary, be provided. However, where that could not be done, equivalent precautions would be—well, the precautions would be equivalent if the surface were made a little bit wider.

Q. I see. You mentioned platforms below, slung below. Would you recommend that as an alterna-

(Testimony of Andrew F. Schmitz.)

tive measure if walking [486] boards or planking, scaffolding, were not available or not practicable?

A. I would, yes.

Q. And how would you recommend that be carried out?

A. Well, it would be necessary to design and construct step-up platforms made for the purpose that would be readily suspendible from any of the beams and would provide a reasonably wide safe footing for the men to step up upon and be in position to reach the cargo when it came within their reach, say at shoulder height.

Q. Now, assuming that such a structure had not been built, would you say that the next best step would be to suspend boards with lines of wire hooks of some sort?

Mr. Kay: Of course, this is leading. I think Mr. Schmitz did mention something like that.

Mr. Harrison: I believe he did, yes.

Q. I interpreted your testimony to say that if no step-up platforms were provided, the next alternative would be to hang, suspend from the beams some sort of a platform?

A. When I said suspend from the beams, I didn't mean it on wire or on hooks, which of themselves, would create additional danger. I meant a specially constructed step-up platform that would be solid when it was fixed in place. The other recommendation is in the record.

Q. Mr. Schmitz, you have testified that you are familiar [487] with the Pacific Coast Marine

(Testimony of Andrew F. Schmitz.)

Safety Code. I call your attention to Rule 911, which reads as follows:

Perhaps we should like some foundation on this code, Mr. Schmitz. How long has this Code been in operation, do you know?

A. Well, the Code has been in operation since prior to 1931. I think it went into operation the first time in about 1929.

The Court: Changed at all since that time?

The Witness: Yes, sir, there were several revisions.

Q. (By Mr. Harrison): And what is the purpose of the Code?

A. The purpose of the Code is to prevent accidents and minimize seriousness of injury, reduce the injuries in the longshore work.

Mr. Resner: Your Honor, Rule 102 states the purpose of the Code. The purpose of the Code is to provide minimum requirements for safety of life, limb and health.

The Witness: That is stated, perhaps, better than I did.

Q. (By Mr. Harrison): Who are the parties to the Code?

A. Well, the parties to the Code are all the members of the Pacific Maritime Association and the unions that they contract with, and the men whom the unions supply to do the work under that contract.

Q. I see. Does the Code have any mandatory effect upon any of these parties?

(Testimony of Andrew F. Schmitz.)

Mr. Kay: Your Honor, there again he is asking this [488] witness to give his opinion on a matter which is in writing here. The Code speaks for itself. I object to that question.

Mr. Harrison. If your Honor please, if we just say that the contract speaks for itself, the Code speaks for itself all you have before your Honor is a great mass of papers which you would undoubtedly have to wade through——

The Court: I will be burdened in any event. If there is anything that you wish to read into the record, you may do so, and then you will have a record.

Mr. Harrison: All right, thank you, your Honor.

The Court: I say that kindly.

Mr. Harrison: I would like to establish the fact that this does appear in the foreword of the Code, which I will now read:

"The Code was adopted at special meetings of the Pacific Coast Marine Safety Code Committee held in San Francisco, August 2, 1929; Portland, August 19, 1930; Los Angeles, November 6, 1931; and San Francisco, October 21, 1932, and remained as a voluntary Code until its inclusion in the November, 1946, return-to-work agreement when it was included in the longshore contract by the Waterfront Employers Association of the Pacific Coast and the ILWU."

Q. Now, Mr. Schmitz, I call your attention to Section 911 of this Pacific Coast Marine Safety Code, where it states: [489]

(Testimony of Andrew F. Schmitz.)

"When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

Now, do you believe, as a safety expert, that the facts which I have outlined to you in any way violate that specific provision of the Safety Code, either in letter or by analogy?

Mr. Kay: I object to that, your Honor, as being incompetent, irrelevant and immaterial, no proper foundation, calling for the opinion and conclusion of this witness. The Code speaks for itself, and also invading the province of the Court. That is for the Court's ultimate determination, he is asking this witness to decide the case, and then suggests that it goes to his weight. We could produce a half a dozen witnesses right now that would testify the other way as he is asking him to testify.

The Court: It occurs to me the witness on the stand, the longshoremen—what was his name?

The Witness: Mr. Ingbrigtsen.

The Court: He was there and he got out of the way, jumped out of the way.

Mr. Harrison: I realize that, your Honor. [490]

The Court: Well, to say that you may or may not get under a load under certain conditions, you will have to be guided by the facts and the testimony from this record. Under the conditions exist-

(Testimony of Andrew F. Schmitz.)

ing I can see how he can get under this plane and get under these others——

Mr. Harrison: Well, if your Honor please——

The Court: I think you are entitled to read the rules if they have any application; I will have to make the determination on the facts proved.

Mr. Harrison: I see, your Honor. I was merely trying to assist the Court in having here an expert on safety who can tell us whether or not in his opinion these facts would constitute a violation of these rules.

Now, I am not—I don't believe that that invades the province of the Court. The Court could, could well find that these rules were violated but that no negligence existed. Now, that is the only province, as I see it, the Court has here is to determine whether or not there was negligence.

The Court: Well, I have to determine that from the facts proved. You are entitled to read that regulation into the record. It will be finally for me to make a determination on it myself.

Mr. Harrison: As to whether or not there was a violation of the regulations, your Honor?

The Court: Yes. If I am in error about it, I will have [491] anybody correct me on it. That is my thought.

Mr. Resner: Furthermore, the Rules, your Honor, set up a standard of conduct that the parties have agreed upon among themselves. The absence or presence of negligence, or absence or presence of unseaworthiness is still the ultimate fact that

(Testimony of Andrew F. Schmitz.)

your Honor will have to decide independently of the standards that the parties have created.

Mr. Harrison: That is exactly my argument, your Honor, and now what I am asking is an expert in this Code to testify whether or not in his opinion the standards have been violated.

Mr. Resner: But that is the judge's province.

Mr. Harrison: You said it wasn't——

Mr. Resner: You want him to read back what I said, Mr. Harrison?

The Court: Off the record.

(Off the record discussion.)

Mr. Harrison: If your Honor please, that is in substance the testimony which I hoped Mr. Schmitz could give us, and because Mr. Kay is so competent in making objections, I don't think I can get it on the record. I will dismiss Mr. Schmitz. I have no further questions.

The Court: Take the witness.

Mr. Resner: I yield to Mr. Kay.

Mr. Kay: I have no questions. [492]

The Court: I trust we didn't abuse you?

The Witness: Not at all. I hope I was of some help.

The Court: I do violence to some of our procedure, but I take that responsibility. I could very well be criticized for many things I do here, but I can't get as legalistic as some of my brethren. I have seen too much of life for that.

Now, then, what is the next step?

Mr. Harrison: Your Honor please, I haven't scheduled another witness until 2 o'clock this afternoon. At that time I believe we will have only one further witness.

Mr. Kay: One witness and then that will be your case, is that correct?

We will be prepared to go on, then, your Honor.

Mr. Harrison: Are you going to call some——

Mr. Kay: We were planning to put on some on Monday, as your Honor will remember.

The Court: We can still—you know, I have burned by a lot of energy in my younger days trying to accomplish almost the impossible, but I have suspended that order of things. Whatever witnesses here today we will hear them, and if necessary we will go over to Monday.

Mr. Kay: Thank you. We will have some here, I am pretty sure.

The Court: I used to put a lot of steam on.

Mr. Resner: You are still putting on a lot of steam, Judge. [493]

The Court: I say that advisedly. I want everybody to have a full opportunity to build up any record they may make here so that in the event I happen to go up the wrong street they have their day in court and can go over to the Circuit Court where it will get the attention of three judges instead of one.

We will take a recess until 2 o'clock.

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [494]

Friday, March 21, 1952, 2:00 o'Clock P.M.

Mr. Harrison: As I said this morning, the Government has one final witness that I would like to call at this time. Will you please take the stand, Mr. Lehmkuhl.

CHARLES R. LEHMKUHL

called as a witness for the Respondent U.S.A., being first duly sworn, testified as follows:

The Court: State your full name, please.

A. Charles R. Lehmkuhl.

Q. Where do you live?

A. In Oakland, sir.

The Court: Your business or occupation?

A. I am a civil service employee at the Naval Air Station, Alameda.

The Court: What is the nature of your work?

A. Now I am supervisor of the supply department personnel.

Direct Examination

By Mr. Harrison:

Q. What position did you hold before you became supervisor of the supply department?

A. I was in charge of the loading dock during the war when we loaded planes aboard tankers, freighters, every type of ship that came in.

Q. What was the title of that job? [495]

A. Quarterman rigger.

Q. Quarterman rigger? How long have you

(Testimony of Charles R. Lehmkuhl.)

been engaged in operations concerning loading of vessels?

A. About the middle of 1942 when we loaded Jimmy Doolittle's Shangri-La gang on the Hornet.

Q. During your experience with these loading operations have you had occasion to come in contact with the mechano deck built on tankers?

A. Yes, sir.

Q. And directing your attention to this model over here, does that accurately or fairly closely represent the mechano deck?

A. A portion of it, yes, sir.

Q. A portion of a mechano deck?

A. Yes, sir.

Q. On how many of these mechano decks would you say you have supervised the loading of airplanes?

A. Oh, fifteen, eighteen, twenty. I wouldn't give you any firm count.

Q. What was your specific job with respect to the loading of these airplanes?

A. I supervised the job of loading them.

Q. I see. When you undertake to load these airplanes, Mr. Lehmkuhl, what men are used over in the Naval Air Station? Are they [496] stevedores?

A. No, sir, we have no stevedores. We use our civil service employees. We had what we called a security crew, a combination of carpenters, blockers and bracers and riggers.

Q. Are these men trained or experienced, qualified in any way?

(Testimony of Charles R. Lehmkuhl.)

A. Only what training we gave them ourselves. If I may digress a little bit, we were not completely organized over there when the war broke out. We were in the process of organizing our department on our job over there, and we hadn't hardly learned to walk yet, if I could use the expression——

Q. Yes.

A. ——and the war hit us and we had to get up and run like the dickens, organizing and doing the job at the same time. We hired what we could get, and sometimes they weren't too good.

When we started shipping planes, we organized the security gang, we called it, a combination of carpenters, blockers and bracers, riggers, few of whom had had previous experience around ships. We didn't require any experience because we trained them ourselves in our work. Our work was a little bit different than we had run into before and we trained the people.

Maybe the work was aboard carriers, flat tops. We [497] trained the people handling our aircraft, loading them, securing them aboard the carriers or flat deck and hangar deck.

Also we were required to load aboard freighters and tankers with the mechano deck. Our people were—at the time I guess we got the first mechano type carrier in there we had probably been in operation eight, nine, ten months, maybe. I have no very good idea of the dates.

Q. I see.

(Testimony of Charles R. Lehmkuhl.)

A. Obviously, being aboard a tanker with the mechano deck, we used the men experienced—the more experienced men of our personnel. Required much smaller gangs. We seldom ever had more than twenty, twenty-five people aboard a tanker and with the more experienced people in the gangs, whereby a tanker would use the whole gang, up to a hundred or more.

Q. All right. Why did you use the more experienced people?

A. Because of the type of work we were doing. I mean, the mechano deck presented a certain amount of hazard.

Q. I see. Would you tell us in your own words, Mr. Lehmkuhl, what was your standard operating procedure when loading planes when the operation was under your supervision?

The Court: Did you load from a dock or a tanker or what?

A. We loaded from both dock and barges, on the offshore side. [498] Our first thought was to get either a—if I may back up a little bit—first, a scale model of the aircraft, a little piece of plexiglass cut to scale. If we were not able to secure a model of the deck the same scale as the aircraft, we drew up such a model and put in all the necessary obstructions. We laid out the deck.

The next job, after we got the deck laid out, we would spread a load of lumber aboard the carrier in some spot on the mechano deck where it would not be in the way of the moving, portable

(Testimony of Charles R. Lehmkuhl.)

beams, to the proper place to provide footing, a kind of huge T-square to tell where the wheels would come.

We lay out the deck, put in the footings. After the first footing was prepared the plane would come aboard, while the gang went ahead and prepared more footings the first plane would come aboard.

The Court: Pardon me. Would you place your footings as you went along?

A. No, sir, the gang moved in and steadied and braced the footings.

Mr. Harrison: I think by "footings" the witness means the platforms.

A. Where the wheels land.

The Court: That is these footings?

A. Yes, for the starboard, port wheels and the tail wheel. [499] The plane would come aboard secured with normally about three taglines. Riggers on the dock would hold the tag lines until they got aboard ship, then the riggers aboard ship would take the taglines. In some cases the men aboard ship would be on the catwalk, and other cases on the deck—mechano deck, and in many cases on the mechano beams. If they happened to be adjacent to where we keep this pile of lumber they would throw out a few planks to walk on.

That procedure was followed until the plane was over the footing and the wheels just about touching the deck. In other words, there was about five to seven inches slack in the oleo—that is the structure

(Testimony of Charles R. Lehmkuhl.)

where the wheels was. There is fluid in that oleo strut that provides resiliency.

Q. (By Mr. Harrison): Sort of a shock absorber?

A. Shock absorber. When the wheels would strike the footings, then the men would turn loose the taglines and actually physically contact the plane, sometimes either by the edge of the wing or the horizontal stabilizer aft, or in some cases they would handle it by the prop. The plane was dropped till the slack was just about out of the line, maybe an inch or so slack left, and a fellow would step underneath and set the wheel cogs.

Q. When the plane came over, and just before it was to be set down on the platform, it is sometimes necessary to steady it, is it not? [500]

A. Yes, sir.

Q. Is it necessary for any of the men to go underneath the airplane to steady it?

Mr. Resner: I believe, your Honor, that is not a situation that exists in our case. Their operation is different, and I think not an appropriate example; certainly no bearing on the problem before the Court.

Mr. Harrison: I submit it is far more analogous than Mr. Nystrom's experience.

The Court: Wouldn't that go to the weight of the testimony?

Mr. Resner: Perhaps so, your Honor.

The Court: Very well, objection overruled.

Mr. Harrison: Would you read the question?

(Testimony of Charles R. Lehmkuhl.)

(Question read by the Reporter.)

Mr. Kay: Your Honor, may I interrupt and interpose my objection for the record that it is incompetent, irrelevant and immaterial; no proper foundation laid; outside the issues of this case, and not based on any evidence here as to that type of loading.

The Court: It is remote, but I will give him a record on it. I think it goes to the weight of the testimony. Objection will be overruled. Proceed.

Q. (By Mr. Harrison): Do you know what the question is, now? [501]

A. It wasn't absolutely necessary for people to go under the plane. Some of my people did it and were reprimanded rather sharply for it.

Q. I see. Have you ever had any planes drop?

A. Yes, sir.

Q. You said one of the first things you do when preparing to do this loading operation is to sling a load of lumber aboard. Where did you land that load of lumber? A. No one certain place?

The Court: Wherever there was room for it?

A. Wherever our layout shows it won't be in the way.

Q. What is the purpose of that lumber?

A. We used that lumber to block up under the landing gear of the airplane after we had moved the portable beams into place.

Q. Is it your testimony that the stevedores, or the men who were used as stevedores, would take that lumber and use it to walk about on?

(Testimony of Charles R. Lehmkuhl.)

A. In some cases they would.

Mr. Kay: Oh, your Honor, see how leading that is? I assume some of the stevedores on these occasions might have, but that is a leading question. I object to the form of the question.

Q. (By Mr. Harrison): Did the workmen ever use the lumber to provide footing for themselves?

A. Yes, sir, they did. Some cases where the deck was clear [502] enough underneath we had tables provided, oh, about, I would say, four, four and one-half feet high, where fellows stood underneath the mechano and steadied the plane, set the wheel plugs in, whatever was necessary, while the plane was on the way down.

Q. What was the purpose of that table?

A. It was for a safety factor.

Q. To avoid having the men going up on the mechano deck?

A. That is right. Not all occasions was that practical, because an obstruction on the deck—we would provide that for such places as where there are valves and pipes, and not where the tanker deck was clear.

Q. When it was practical, you used it?

A. That is right.

Mr. Harrison: That is all.

Cross-Examination

By Mr. Resner:

Q. You said you have had some planes drop on you? A. We have had, yes, sir.

(Testimony of Charles R. Lehmkuhl.)

Q. Was it either a failure of human beings, or the failure of apparatus which caused that to happen?

A. Well, I would say failure of human beings, when we dropped the rig when it was too far away, try to reach too far with the crane.

Mr. Resner: That is all. [503]

Cross-Examination

By Mr. Kay:

Q. Mr. Lehmkuhl, these planes you are talking about that you have directed, several of them have wheels and others——

A. In most cases we did, yes, but we have loaded planes for the army that set on——

Q. Tripods? A. Sometimes.

Q. Tripods? A. Tripods, yes.

Q. On the ones where you have wheels and they will take the shock of five or six inches when they land on platforms, you don't expect much damage, is that correct?

A. I don't quite understand the question.

Q. If that plane is dropped down with the wheels striking the—I mean lowered down until the wheel hits the platform, there is a give of five or six inches? A. Yes.

Q. If they drop a little further than that, then they light onto that platform, or more force, they would take up some of that shock, is that right?

A. It is taken up in all cases, sir, as it hits the platform the oleo struts are still active.

(Testimony of Charles R. Lehmkuhl.)

Q. But the wheel is the part of the assembly that takes the shock? [504]

A. Yes. They are attached to the lower part of the oleo.

Q. When you have the strut complete with wheel, you have to be more careful in landing that, isn't that right, on the platform?

A. Well, I don't believe so. We expect a certain amount of cost. After all, we were interested in the airplane, not in the wheel.

Q. I appreciate that, but if the load—if the plane is lowered, rather, further than it normally would be, the wheel takes a certain shock?

A. If it is over a foot or so. There is a certain amount of resiliency to the tire.

Q. But with tripods on, if it hits with the same force, you are liable to injure the tripod or disengage it, isn't that right?

A. There is more probability, yes, but the oleo structure absorbs the shock. If I may digress and enlarge on my statement at first there, we permitted the fluid to stay in the oleo until that plane was landed. After the plane was landed, then we drain the oleo and put it down so that there wouldn't be the cost, and so we had to be going up and down.

Q. You are familiar with this particular plane, Mr. Lehmkuhl?

(Showing picture to the witness.)

A. Looks to me like a jet without the engine on it.

(Testimony of Charles R. Lehmkuhl.)

Q. That is right. Libelant's exhibit 14. You see that strut [505] there, do you—I mean the tripod? A. Yes, sir.

Q. How is that attached to the strut?

A. My recollection, there is a—the wheels are taken off and the axle is on the stake with the right angles to the oleo, and as I recall there is a saddle at the top and clearance to go over that to hold the plane.

Q. It might move up—if it doesn't come in on a three-point landing, might override the other, one clear over the other?

A. There is that possibility, but they would normally hang straight.

Q. But sometimes it doesn't, and you have to watch that, isn't that right?

A. It could be, yes, sir.

Q. And where you have wheels on and come down on this platform, if it isn't sitting just where you want it, it is a matter of pushing that into the position you want it with the tripod?

A. As you lower it down, you control the airplane by using tag lines, and it is barely floating above the platform or footing, and before anyone can go underneath to touch any part of the airplane.

Q. I think you will agree with me that in landing the plane with the structure, that is, the tripod, on one of the [506] platforms, you have to watch that more closely than landing a plane with wheels?

A. No, sir, not until that plane is down to the point of practically sitting in there, and men go underneath and control the tripod.

(Testimony of Charles R. Lehmkuhl.)

Q. From that point down to the platform it is more difficult—withdraw that. They have to use more care in landing with tripod than wheel?

A. I wouldn't say so, no.

Q. The fellow that has the process of lowering can hold the wheel on the place where it is landed, is that right?

A. If it is landed on a solid surface.

Q. If you jam that tripod down with the same force you can a wheel, you might knock the tripod off? A. Not if it landed square.

Q. But sometimes they don't land square.

A. That could be true, but I stated that I did not allow any personnel under the plane until it was practically in a resting position with the oleo strut hanging down.

Q. How far would the tripod be off the platform at that time? A. Half an inch to an inch.

Q. Where are you to see whether it is half an inch or an inch?

A. Up the forward or aft of the plane, or starboard side.

Q. And does the crane operator put that down with such [507] precision you can stand away and watch it go down and tell it is within half an inch of that platform?

A. The crane operator takes instructions from the rigger, who is on the spot and giving signals.

Q. Let's assume there is a barge alongside one of these ships with a mechano deck and they have to

(Testimony of Charles R. Lehmkuhl.)

take the plane completely over to the other side where the man operating the crane can't see it.

Mr. Harrison: I object to that. That is not within the evidence. The crane operator said he could see it.

Q. (By Mr. Kay): All right, let's say the crane operator can see it. Certainly couldn't see the crane operator way over there in order to see whether it comes within half an inch of that platform.

A. It isn't his duty to, sir.

Q. I didn't say it was. The whistle man——

A. The whistle man, or rigger, as I call him, is on the barge. He picks up the plane—there is a rigger in charge of every movement, and second man. The rigger is on the barge, oversees the installation and proper lifting sling and proper lifting hoist, picks it up, swings it over, if it is an offshore job, puts it over the tanker to the presumed landing spot, then gives the crane operator the signal. He will then follow instructions from the man up on the catwalk of the tanker, or probably on the mechano deck either fore or aft of the [508] platform, wherever he can be seen by the crane operator and observe the job that is going on himself.

Q. Let me ask you this: Have you ever yourself done any of this loading of planes, that is, actually engaged in the landing of the plane yourself?

A. Yes, sir, I have been in charge of the crane many times, and many times I took over from my rigger on the job and landed the plane myself.

(Testimony of Charles R. Lehmkuhl.)

Q. All right. Actually, when you are landing those planes—have you landed planes of this nature?

A. No, sir. At the time we were loading, jets were not in vogue then, but we loaded all types of navy craft—big two-engine jobs and the small fighters, and on some of the jobs for the army there were B-39's, P-47's, and larger types which designation I don't remember.

Q. Do you know how far it is from the bottom of this fuselage to the bottom end of the tripod? Have you any idea?

A. I would assume on a jet type aircraft, probably about 24 or 23 inches, maybe a little bit more, 30 inches. I have never measured it.

Q. Is this tripod on this particular plane equipped with shock absorbers?

A. The tripod is not but the oleo strut is to which that is secured.

Q. Is that above the tripod? [509] A. Yes.

Q. How was that attached to the tripod?

A. The tripod is attached to the axle of the plane.

Q. By what?

A. By, I assume, a saddle at the top of the tripod with a clamp on top of it.

Q. The man you call a rigger, how far would he be from the platform that is landed—that is, from the tripod and the platform where it is to be landed?

A. Is that the rigger giving instructions to the crane operator?

(Testimony of Charles R. Lehmkuhl.)

Q. Yes.

A. He would be, oh, I would say anywhere, eight to ten, twelve feet away, wherever he can be seen by the crane operator and observe the job himself.

Q. Sir, is it your testimony that a man standing off some twelve feet away can tell to within half an inch of this stand?

A. In some cases further than that, yes, sir.

Q. After it gets to that point, a man certainly gets up to the tripod to see it is landed exactly where it is supposed to be, is that right?

A. After it is to within practically the permanent setting place of the airplane, yes, sir.

Q. And he is right there on the platform, is that right?

A. When the tripod is centered on the platform and in its [510] approximate final resting place, the people go in and steady it by actually physically taking hold of the airplane.

The Court: At that time is he physically under the plane?

A. Yes.

Redirect Examination

Mr. Harrison: I have one more question.

Q. Before the landing gear gets over the landing platform, is there any necessity for the man to go under the plane?

A. No, sir. I wouldn't permit it.

Mr. Harrison: Thank you, that is all.

(Testimony of Charles R. Lehmkuhl.)

Recross-Examination

By Mr. Resner:

Q. Mr. Lehmkuhl, I want to ask you a couple of questions. The rigger is the man who gives the whistle signal to the man on the crane, is that correct? A. Whistle or visual signal.

Q. They give a signal either by hand or with a whistle?

A. That is right. If they are out of sight of the crane operator they give a whistle signal. If they are in sight of the crane operator they give a hand signal.

Q. As I understand it, is it customary to give signals by whistle when you are on the offshore side?

A. Some commercial crane companies do that, yes. We did not, because I had two people spotted who were the first man and the number 2 man in the gang, one man on the barge who was to lift the aircraft, the plane, over the ship, and to its [511] resting spot on the tanker deck, then the crane operator was given instructions to take his instructions from the man on deck.

Q. So you are using two signal men?

A. Yes, sir, upon occasion. Upon occasion the man on the barge will follow the plane right up on the deck to give signals.

Q. Let's see, who is your employer?

A. Naval Air Station, Alameda.

Q. Naval Air Station? A. Yes, sir.

Q. Are the armed services unified now? Load-

(Testimony of Charles R. Lehmkuhl.)

ing operations done by both the armed services as a unity, rather than by separate division?

A. I believe now they have what you call a military sea transport which takes care of it. I am not familiar with that.

Q. Are you still loading planes?

A. No, sir, I am not.

Q. How long since you have been?

A. Oh, I would say two and a half, three years.

Q. At that time the navy was doing its own loading and the army was doing its own loading and the air force was doing its own loading, is that about it?

A. Not entirely, sir. We did a good many jobs for the army air force—excuse me—during the year I was in charge of the loading direction at the navy air station. [512]

Mr. Resner: Will you read that answer back, please?

(Answer read by the reporter.)

Q. (By Mr. Resner): The navy would do the work of the air force, and similarly would do the work of the army?

A. I don't know. I have no knowledge of that.

Q. Take a look at these pictures, eight, nine, ten for the libelant. They are pictures of a rig, similar to these heavy lift rigs?

A. Somewhat, not to ours. I have done very little work upon this type of rig.

Q. You are familiar, though, with that type of rig? A. Somewhat.

(Testimony of Charles R. Lehmkuhl.)

Q. Did the navy have any rigs like that?

A. No, sir.

Q. Are you aware of the fact that the army did have such rigs?

A. Oh, yes, I was aware of that fact, but I never worked on that particular rig.

Q. Never worked on that type of rig?

A. We had on occasion some crane service in the naval air station, Alameda, it was very inadequate. There was once when I was in charge of loading direction we had three American Railroad cranes on the dock. We had anything heavier, or any on the offshore side of the ship, we contracted with Smith or Haverside. [513]

Q. They had heavy rigs?

A. They had heavy rigs. I believe, it seems to me, my recollection, we had a big rig.

Q. This is a name plate on this particular rig: 134,400 pounds at 73 feet radius; 83,000 pounds at 88 feet radius; 33,600 pounds at 100 feet radius; U. S. Army Transport Corps. Are you familiar with the kind of rig having that particular weight and load in that type radiation?

A. It is standard barge crane with limited capacity, yes, sir.

Q. Yes, but when you had a lift job like that, you say you would go get an independent contractor, wouldn't you? [413-A]

Q. You can see in this cab here, that it is oh, maybe 30 to 45 feet above the deck of the barge,

(Testimony of Charles R. Lehmkuhl.)

Mr. Lehmkuhl, that is the cab for the crane operator? A. The operator's cab.

Q. The operator's cab, and that is on the offshore, and down in this lower righthand corner that is the deck of the vessel? A. Yes, sir.

Q. And if a plane were being loaded across this deck and over onto the inshore side, of course, you are familiar with the fact that that is quite a distance to move a plane in a heavy rig operation of this kind? A. Yes, sir.

Q. And that would entail the giving of whistle signals from a man in an advantageous position on the ship to the man in the cab on the barge?

A. I wouldn't say it was necessary, probably might be convenient, but not necessarily, sir.

Q. Well, it would be usual and a proper practice?

A. In my practice over there I was very disinclined to depend upon whistle signals, I preferred the visual signal.

Q. If the Army had performed this type of operation with an Army civilian in the cab and an Army civilian as the whistle man or a rigger man on the deck giving whistle signals if the Army used that particular type of practice you would be [514] inclined to quarrel with it?

A. No, sir, be completely out of my jurisdiction. If I was in charge I would prefer they give visual signals.

Q. If the Army prefers the other practice would you say that was improper?

(Testimony of Charles R. Lehmkuhl.)

A. Not necessarily.

Q. Well, not necessarily; what do you mean?

A. I mean by that, sir, I think either way would be correct.

Q. All right. Now, let me read you something, Mr. Lehmkuhl. This is a statement of a man——

Mr. Harrison: What are you reading from, Mr. Resner?

Mr. Resner: From page 20 of the deposition of Charles Cates, the whistleman.

Q. I am going to read something to you in connection with the happening of an accident where a plane dropped.

Mr. Harrison: Your Honor, this deposition is not in the record.

Mr. Resner: I am going to ask the witness a hypothetical question and his familiarity with loading operations, Mr. Harrison.

The Court: It is not confined to the record on that.

Mr. Harrison: I understand.

Mr. Resner: Thank you, your Honor.

Q. Now, Mr. Lehmkuhl, this man's being asked to tell us how the accident happened, and then he gives this answer: [515]

"Just prior to the time that this happened we had set the plane down on the pallets and it wasn't in the exact position the way they wanted it, so we picked it up, we had to swing it further aft in order to clear the stays. We had to boom a little closer inshore so we could swing it toward the bridge to

(Testimony of Charles R. Lehmkuhl.)

clear the stays. So I picked it up, and I gave four signals, that is, four whistles to boom down, and of course I'm watching the plane to see that it is clear all the time, and it came back suddenly and it hit, and just as it hit the block caught it and it seemed like it kind of caught, you know, like that, and several men had been working there all the time, they have to steady this plane as it goes around."

Now, in your experience and work, Mr. Lehmkuhl, are you familiar with that kind of a situation where you bring the plane, like this man did, to a particular place, it isn't the way you want it, and you pick it up and move it over, and the men grab hold of it, see that you get it into the proper position; it is a frequent occurrence landing planes on decks, isn't it?

A. It occurs, I wouldn't say frequent. I am speaking, if you will please, from my own experience, the way we load aircraft at my job, I mean.

Q. I understand, sir. [516] A. Okay.

Q. But by comparison to this situation that I have been reading you about, in your experience this is not an unusual thing to occur in the landing of a plane, you kind of maneuver it one way——

Mr. Harrison: Your Honor please, merely for the purposes of the record, Mr. Resner has used a very unique device to get into evidence——

The Court: He always does that.

Mr. Harrison: He is now framing a hypothetical question upon a matter which is not in the record, there is no evidence at all that it is properly in this

(Testimony of Charles R. Lehmkuhl.)

record that the plane was ever landed and picked up again, framing a hypothetical question on something which was ruled out by this Court.

Mr. Resner: I beg your pardon, Mr. Harrison, it was ruled out, his Honor merely told us that if the witness was available we should subpoena him, but I submitted both to you, counsel, and to his Honor that the gentleman whose experience I am referring to in this deposition is an employee of your client, the United States of America.

Mr. Harrison: He is just——

Mr. Resner: You apparently—Mr. Harrison, sir—you apparently have seen not fit to call him as your man. Now, if we want to get certain evidence here by asking another of your witnesses, this is perfectly proper. If [517] you want to refute it in any way, why, this man is right down here in the Army station, all you have to do is call him in if there is anything you think you want to explain, why, Mr. Cates is there.

Mr. Harrison: Your Honor please, I suggest——

The Court: Pardon me, so I may follow this. You were reading from what?

Mr. Resner: I was reading from the deposition of Mr. Cates.

The Court: Mr. Cates has not appeared?

Mr. Resner: He has not appeared, he is a government employee who was giving the signals, the whistleman.

Mr. Harrison: Your Honor, please, that is not—well, that is a matter of record, but, your Honor,

(Testimony of Charles R. Lehmkuhl.)

over my objections, ruled out the business of Mr. Cates. At that time I pointed out that the best way —that he was available to Mr. Resner and that his testimony in my opinion would be nothing but accumulative and did not go to any of the elements of this case. We already had the barge foreman.

The Court: I think I can appreciate this situation. Here we have an expert.

Mr. Resner: Certainly.

The Court: And we have developed his activity during a period of time. You might dispense with his deposition entirely and ask him what you are asking him now. [518]

Mr. Harrison: That is very true, but what he has done is take some of the deposition, some facts which are not of record into this case and frame it into a hypothetical question.

The Court: I don't want to do violence to the rules of evidence, but I would have no hesitancy, if this man was available, you had an opportunity to meet that, I would give him a record, but I think it can be raised another way so there will be no difficulty.

Mr. Resner: Thank you, Judge. I will just ask you, Mr. Lehmkuhl, and then I will subside——

Q. The thing that I have been presenting to you by question in the form of words of another man, in your experience is the kind of a maneuver which is not uncommon, in the handling of planes and loading them aboard a ship, isn't that true?

A. It has happened to the extent that we have

(Testimony of Charles R. Lehmkuhl.)

had to sit the aircraft down and pick it up again, or, that is, to set the aircraft, respot it, at least pick it up again, where we get a better lift on it.

The Court: Place it to your advantage?

The Witness: Yes.

Q. (By Mr. Resner): Yes.

The Court: I understand that.

Mr. Resner: Yes, Judge.

Q. And then the men that are going to handle the plane, they [519] have to help guide it to the appropriate place?

A. Yes. They set it down, and when they repicked it up they barely float it, in the words, the parlance of the trade, just barely float it and move it so that the wheels or landing stands are off of the platform.

Mr. Resner: Thank you.

Redirect Examination

By Mr. Harrison:

Q. If they had to pick the plane up to the extent of two or three feet above the main deck, would it be proper for the men to go under?

A. They would handle it with tag lines.

Q. They would handle it with tag lines?

A. Yes.

Q. Mr. Lehmkuhl, you came here just because I called you up, you are not under subpoena, are you?

A. No, sir.

The Court: That is to avoid the fee.

(Testimony of Charles R. Lehmkuhl.)

Q. (By Mr. Harrison): Other than the five minutes that I talked to you before you came down here, have I discussed this case with you at all?

A. No, sir, I was called up by Mr. Schmitz, I believe, last Tuesday. I believe he said he was a safety man——

Q. Yes.

A. I don't recall. Later that afternoon I was out of my office, I came in about 3 o'clock and there was a note on my [520] desk to call Mr. Harrison, which I did. He asked me a few questions, asked me if I would come over and testify in the case as a government witness. I said I would provided it was cleared with the necessary authorities at the Naval Air Station.

Mr. Harrison: I merely wanted to point out, your Honor, that this was, of the experts that have appeared, here, is the only one who hasn't talked over his testimony with counsel.

The Court: I don't care, if you weren't acting in good faith I would sooner or later discover it. Until that happens, you can relax.

Mr. Harrison: Yes, your Honor. That is all.

The Court: Is that all from this witness?

Mr. Resner: I have no more questions.

Mr. Kay: That is all, your Honor.

The Court: Thank you for coming.

The Witness: May I go home now?

Mr. Harrison: You can go back to work.

The Court: So far as I am concerned, you can call it a day.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Harrison: Well, if your Honor please, I believe that is the Government's case.

Mr. Kay: We have some evidence then to present, your [521] Honor, and we would like to call Mr. Holbrook, please.

DAN PHILIP HOLBROOK

called as a witness on behalf of the respondent-impleaded, sworn.

The Court: What is your full name?

The Witness: Dan Philip Holbrook.

The Court: Spell your last name for the Reporter.

The Witness: Capital H-o-l-b-r-o-o-k.

The Court: Where do you reside?

The Witness: Richmond, California.

The Court: And your business or occupation?

The Witness: General superintendent of Jones Stevedoring Company.

The Court: Jones Stevedoring Company?

The Witness: Yes, sir.

Mr. Kay: That is our client, your Honor.

The Court: Yes.

Direct Examination

By Mr. Kay:

Q. Before you were general superintendent of Jones Stevedoring Company, will you just briefly

(Testimony of Dan Philip Holbrook.)

give his Honor your background and stevedoring experience?

A. Started on the waterfront as a longshoreman in 1928, went walking boss in the first part of the war, and during the war went to Jones Stevedoring Company as walking boss and also as assistant superintendent of stevedoring at the Alameda [522] Army Air base in Alameda. After the war I went—or after leaving Jones' employ in '48, I went to Alaska as manager of the Northern Stevedoring and Handling Corporation, and returned to the waterfront a little over a year ago, and worked as a walking boss up until the first of this month, when I became general superintendent of Jones Stevedoring Company.

The Court: When you came over there I thought you were a banker.

The Witness: No, sir.

Q. (By Mr. Kay): Mr. Holbrook, in the course of your experience have you had to do with loading planes on mechano decks? A. Yes, sir.

Q. That model you see over there, that is a fair representation of a forward port section of the mechano deck on one of these tankers, is that right?

A. A fair representation, lacking the obstructions underneath it.

Q. In other words, underneath the mechano deck there are quite a number of obstructions?

A. Yes.

Q. By the way, what would you say those are?

A. Pipes, valves, vents, hatches.

(Testimony of Dan Philip Holbrook.)

Q. And these vents, come up from the deck how far? A. Around four feet. [523]

Q. Now, would you say about how much experience you have had with that type of loading?

A. Oh, I imagine that I have been on actually about a dozen loadings as a walking boss and probably a dozen that I have had supervision over them.

Q. And by the way, in all that experience have you ever known of a man ever becoming injured in that operation?

A. No, sir, we have never, I have never had any injury on one of them.

Q. Have you ever heard of one?

A. Not until this case here.

Q. Yes. Now, will you tell the Court whether or not on any one of those occasions planking was ever used on the mechano deck except for the platforms on which the struts or the landing gear of the planes was to be landed?

A. No, we never, never used any.

Q. And can you, in view of your experience, are you able to tell us why you don't, why planking isn't used?

A. Well, it is impracticable, for one reason, that the beams and stuff have to be movable as the planes are being loaded, and another thing is that if planking was put on the thing it would be a—it would be a hazard through loose ends and nothing but traps by the tender ends.

Q. What do you mean by the tender ends?

A. Tender ends protruding over a beam. [524]

(Testimony of Dan Philip Holbrook.)

Q. In other words, in the course of moving the beams it would inevitably follow that some might extend over beyond a beam, a man might step on that loose end and go down? A. Yes.

Q. Would that be likely to occur with respect to the movable beams on the thwartship beams in walking on those? A. Either one.

Q. You have seen the operation, I take it, of barges alongside of a tanker in which planes are loaded over onto the mechano deck?

A. That was the only type of an operation that we performed by heavy lift barge, either at the dockside or at anchorage.

Q. Yes. And will you describe what that operation would be in taking over a plane from the barge to put it on the opposite side of the deck, that is, where you would go across the starboard side of the mechano deck and load it on the port side?

A. Well, the plane would be made fast on the barge, tag lines secured to it, and the plane picked up high as possible because they have to boom down with it to reach further across, and while it is being loaded it is guided by men with tag lines down to a position of approximate placing.

Q. Now, about how far would that be to this approximate place you speak of, where would the plane be with reference to the men working [525] with it?

A. It would be approximately a foot or so off the platform or the tripods where it is going to rest.

Q. You mean a foot from the tripods?

(Testimony of Dan Philip Holbrook.)

A. Yes.

Q. Now, is the position——

A. To allow for the working of the barge.

Q. Now in the operation of this barge, Mr. Holbrook, it is out in the stream, out in the Bay there, is that right? A. That is correct.

Q. And will you state whether or not during that operation there is any movement of the water, and if so, from what cause?

A. Movement of the water from tide, wind, also the hazard of a large vessel or a small vessel going by.

Q. And that causes then a movement in the water, movement of the barge——

A. Movement of the plane.

Q. And of the plane. And when you get that in that position what is your job then?

A. Job then is to get the tripods in position to land on the platform.

Q. And how is that done?

A. By a man taking hold of them.

Q. And where would the man stand?

A. He will have to stand in the position that, where he can [526-7] place his hands on the tripod.

Q. Is that done, Mr. Holbrook, while this load is coming over, while the plane is coming over and while it is in the process of flight? A. No.

Q. When is it done?

A. It is done after that plane comes to a stop.

Q. And then is it customary and usual practice for stevedores at that point then to hold onto that

(Testimony of Dan Philip Holbrook.)

strut to help to guide it down? A. Yes.

Q. And in the guiding of that down to that position on the platform is it necessary also, or does that involve or include the steadying of the——

A. Yes.

Q. ——plane?

A. Because you have a plane—most all planes are suspended on three points, rest on three points. Your deck of your plane—of your ship, is not perfectly level fore and aft or athwartship, it has a crown on it, and the plane is supposedly slung on a level, and therefore one point on the plane will touch before the second or third point does, and until all three points have a firm bearing these stands have to be shifted and kept in a vertical position.

Q. I take it these stands are put on as a makeshift affair, [528] not a part of the plane, of course, the tripod? A. Yes.

Q. Now, is it easier to land one with the tripod on, or is it easier to land one with the wheel on, or are they both the same?

A. It is easier to land the one with the wheels.

Q. And why is that?

A. Because all there has to be is a chalk or a block in an approximate position to keep the plane or wheel from rolling off the platform.

Q. Now, where you have a tripod then will you state whether or not it is necessary for that man guiding it down into a final place from its position about a foot off the platform, is the man that is there at that strut to be right under that plane?

(Testimony of Dan Philip Holbrook.)

A. Yes, it is.

Q. Is there any other way he can do that job?

A. No, none that I know of, because if that isn't perfectly level the plane will kick.

Mr. Kay: I think that is all.

Cross-Examination

By Mr. Harrison:

Q. Well, with reference to that particular type—to that testimony, Mr. Holbrook, until the landing gear comes over the platform itself is it necessary for a man to get over there and hold onto the landing gear?

A. Will you rephrase that again? [529]

Q. Yes. Until the landing gear which we are going to land on this platform arrives over the platform itself is there any necessity for a man to hold onto the landing gear?

A. No, can't before it gets over, is—it is practically impossible for them to get ahold of it.

Q. In other words, to hold onto the landing gear I would have to reach underneath a wheel of the plane? A. Most cases, yes.

Q. Yes. That is before the arriving at the platform? A. No, not before the arriving.

Q. Is there ever any necessity for holding onto it before it arrives at the platform?

A. No, because you have to hold with the tag lines until it reaches——

Q. Would you say then——

(Testimony of Dan Philip Holbrook.)

Mr. Kay: Mr. Harrison, I didn't get the last part, what did he say, Mr. Reporter?

(Record read by the Reporter.)

Mr. Kay: He started to say something, it is lost now.

Q. (By Mr. Harrison): That is, you hold on until the tag lines—until it arrives over the platforms? A. Yes.

Q. Would you say if a man took it upon himself, or instructed to grab ahold of the landing gear underneath the plane before it arrived on the platform, was that an unnecessary operation? [530]

A. Well, there would be a very short time that he could get ahold of it before it came to a stop.

Q. I see. But if he grabbed ahold of it before it arrived over the platform he would be performing an unnecessary operation?

Mr. Kay: Just a moment; I think that needs to be clarified. "Over the platform" is a relative term. We understand in this case that they don't spot exactly over, there is some adjustment to be made, and I think that should be made clear.

Q. (By Mr. Harrison): Let us assume—I will lay a little more foundation here.

Mr. Holbrook, if, as in this case, a plane dropped and it went all the way down so that the wings of the mechano deck—I mean, the wings themselves struck the mechano deck—— A. Yes.

Q. ——would you assume from your experience

(Testimony of Dan Philip Holbrook.)

that it had not been spotted over the platforms at that time?

A. Not necessarily, because it might have hit the platforms, in most cases they are very small, might have hit the platform and glanced off of it, which it could do very easily.

Q. Let us say we know as a fact it did not hit the platform, would you say, safely assume it was not over the platform when it dropped?

Mr. Kay: I don't follow that, I think that unintelligible; object on that ground. [531]

Q. (By Mr. Harrison): You understand the question?

A. I think I understand what you mean. You're asking if the plane was dropped and didn't hit the platform.

Q. Then it would be safe to assume that it was not over the platform when it dropped?

A. The strut was not over.

Q. The strut was not over the plane. Now none of the struts were over any of the three platforms; is that right?

Mr. Kay: What is this about?

The Witness: I don't understand.

Mr. Kay: I don't understand what you are getting at.

The Court: To be frank with you, I can't follow it, either.

Mr. Harrison: Your Honor, please, it is our position in this case that—as I have stated it so often—that this man, Mr. Luehr, was not under-

(Testimony of Dan Philip Holbrook.)

neath this plane for the purpose of attaching any tripod or bringing the tripod down to the platform, because the facts are that the airplane's landing gear had not come within the vicinity of that platform at that time. That can be shown by the fact that when it dropped the landing gear of the plane didn't even hit the platforms, it went down in between the mechano deck.

I am asking this witness if when one of these—if when a plane dropped and the wings struck, would it not be safe to assume that it had not been spotted over the platforms. [532]

Mr. Resner: The difficulty with reference to Mr. Harrison's question is testimony based upon conjecture, and upon which I object. We are concerned here with the facts as they are existing, not counsel's conjecture, or what might be.

Mr. Harrison: I have stated the evidence very fairly. The fact is that the wings of the plane did come all the way down and strike the mechano deck and that the landing gear missed the platform. Those are facts, known facts. They are—do you controvert those facts at all, Mr.——

Mr. Resner: Mr. Harrison, I think you are trying awfully hard to make the best of a tough situation.

Mr. Harrison: Again, do you controvert the facts the wings of the plane struck the mechano deck?

Mr. Resner: I don't know that I am a witness; I don't know, if you are inviting a stipulation. I

(Testimony of Dan Philip Holbrook.)

am an advocate presenting the facts here and I am going to let Judge Roche decide it.

The Court: I will try to do my best.

Mr. Resner: I know you will, sir.

Mr. Harrison: Well, I think the fact is so plain to all I need not go into it any further with this particular witness.

Q. I will ask you once again for the purpose of the record: Until the landing gear comes over the platform is it necessary for a man to grab hold of the landing gear?

Mr. Kay: Just a moment. Your Honor, there again, at [533] what stage? Where it is 12 feet up there or approximately over there or what? That is what I don't understand. I am sure the witness——

Mr. Harrison: I don't care where it is, until it gets over the platform is it necessary to hold onto the——

Mr. Kay: That is relative——

The Court: Let me give you my state of mind. I am trying to follow all of this, have some difficulty at times the testimony here. What witness, I do not recall, testified this plane came down, they approached it, and they attempted to follow it down to spot it. Is that a fact?

Mr. Harrison: No, your Honor, that is not the situation.

The Court: Somebody correct me.

Mr. Harrison: May I suggest to you that in the situation here the plane came down, then the testi-

(Testimony of Dan Philip Holbrook.)

mony is that it was—since it was not over the platforms it had to be moved.

The Court: Yes.

Mr. Harrison: And that the crane operator was going to boom down, wasn't lowering the plane at all, it wouldn't lower the plane to boom it down.

The Court: I am talking about the testimony before it fell.

Mr. Harrison: This is before it fell, yes, your Honor.

The Court: Did they approach and touch the plane? Any witness here? [534]

Mr. Harrison: Yes, they did, your Honor.

The Court: That is what I am thinking about.

Mr. Harrison: Yes, they did, that is what the Government contends, that Mr. Luehr himself placed himself in an entirely unnecessary position under the airplane, the job which he was to perform was to steady from swinging.

The Court: I don't think you can limit the matter to approaching the plane and tell him what he may or may not do.

Mr. Harrison: My argument is this: That the landing gear hadn't come over the platform, he couldn't have been down there, he testified he didn't have bolts, the tripod, or anything; he could not have been up there for the purpose of attaching that landing gear.

The Court: I don't know what purpose, but he was there; that is all I am contending at this time.

Mr. Harrison: He was there.

(Testimony of Dan Philip Holbrook.)

The Court: But to say, to go further, all right. What do you conclude from this testimony, what is the quarrel?

Mr. Harrison: That he was in the particular position unnecessarily and improperly; there was no necessity being under this cargo.

The Court: This is very unusual, up to this time I wouldn't prove that he was. I say that advisedly, and I will give you plenty of time to change my view on it. I say that kindly, so let us proceed. You get the best record you can. [535]

Mr. Harrison: All right, I will ask the question once again.

Q. Until the landing gear of the plane arrives—to please Mr. Kay, I will say within the square footage of the platform, that is, within that area directly above the platform—is it necessary for a man to go underneath that airplane and hold on to that landing gear until that time?

A. No, not until——

Q. It is not?

A. Not until it is over the platform, no.

Mr. Harrison: Your Honor, that's our contention, it was not over the platform.

The Court: All right.

Mr. Harrison: He was there unnecessarily.

Q. One more thing. You testified that it is not the general practice of the Jones Stevedoring Company to provide any walking boards or planking for these men; is that true?

Mr. Kay: He didn't say that; he said there were

(Testimony of Dan Philip Holbrook.)

never any walking boards or planking on mechano decks; wasn't a question of providing them.

Mr. Harrison: All right. Who else is going to provide them?

Mr. Kay: That is beside the point; that was his testimony.

Q. (By Mr. Harrison): Is it true that the Jones Stevedoring [536] Company never used walking boards or planks on this type of an operation?

A. I don't just understand the question. I was asked before whether I used them. Now it is whether Jones furnished them.

Q. That is right—oh, I see, you yourself have never used them; I understand. A. Yes.

Q. Would you say then that it would be possible to use them? A. No.

Q. It is impossible to use them?

A. Yes; impractical, too.

Q. Is it impossible?

A. Yes, practically impossible from the safety factor.

Q. Well, Mr. Holbrook, there has been testimony in this case from men who have used them. Now—have seen them used. You think they are lying?

A. No.

Mr. Kay: Your Honor——

Mr. Resner: Your Honor, please, I would like to say——

Mr. Kay: ——that is improper cross-examination.

(Testimony of Dan Philip Holbrook.)

The Witness: I have never seen them used. I have never used them.

Q. (By Mr. Harrison): You think it is impossible?

Mr. Kay: Asked and answered, your Honor; objected to.

The Court: He said it was impossible from the safety [537] standpoint.

Q. (By Mr. Harrison): Is it possible for the operation to be performed with walking boards, then? A. No, I don't think it is.

Mr. Harrison: I believe that is all.

Mr. Kay: Just a couple of questions, your Honor.

Mr. Magana: Does the Court want to take the recess now?

The Court: Is that a polite way of asking for a recess?

Mr. Magana: No, your Honor.

The Court: We will take the recess.

(Short recess.) [538]

Cross-Examination

By Mr. Magana:

Q. Mr. Holbrook, I just have a very few questions. Maybe you can straighten this out for us. As I understand it, the man in the cab operating the crane operates it exclusively on signals; is that correct?

A. In our case it is all on whistle signals, sir, and has been.

(Testimony of Dan Philip Holbrook.)

Q. Whatever it is, it is on a signal of the party watching the operation at an appropriate place?

Mr. Harrison: I object to this line of testimony. This man wasn't there. He doesn't know whether it was whistle signal, hand signal, or anything else. He is incompetent to testify on this point.

Mr. Magana: I don't care whether it is hand signal or whistle signal. I will reframe it, your Honor. I can get at it another way.

Q. (By Mr. Magana): The man in the cab does receive a signal to operate the crane; is that correct? A. Correct.

Q. All right. The man who gives the signal, as I understand it, is called the whistle man; is that right? A. Yes.

Q. In this operation, whenever you are using a barge—in this case I understand it was an off-shore barge—can you tell us whether or not the barge, when it is offshore, has a tendency to move to one side or the other? [539]

A. Yes, it is more or less movable.

Q. And with reference to the boat itself, if it is inshore, does that have a tendency to move depending upon the tide, the wind, and other factors?

A. Yes.

Q. Then in stopping the descent of the plane, who is it who stops the descent of the plane?

A. The signal or whistle man.

Q. Is there any fixed level at which that plane is stopped, or does that depend upon the whistle man?

(Testimony of Dan Philip Holbrook.)

A. Depends upon him and his judgment.

Q. Then once the plane is stopped so that it is no longer descending, if it is within reach, at that time can you tell us whether the stevedores customarily hold on to it to guide it to the platform?

A. Right, yes.

Mr. Magana: That is all.

Mr. Harrison: Well, I will get you to straighten out this again. Counsel has successfully dodged the issue.

Recross-Examination

By Mr. Harrison:

Q. To do that, do they hold on to it before it reaches the area of the platform?

Mr. Kay: You see, I objected to that three times. We have asked this man something definite, then they question if it is way overhead—— [540]

Mr. Harrison: All right——

The Court: I stated my state of mind at the very beginning of this trial. As I recall it, this plane was lowered between three, five, and six feet.

Mr. Harrison: That is right, your Honor.

The Court: And that was the position that he, the plaintiff here, approached it for the purpose of guiding it.

Mr. Harrison: That is right, your Honor.

The Court: Proceed.

Mr. Harrison: But we must further state, your Honor, that he wasn't guiding it down to the platform because it hadn't arrived over the platform.

(Testimony of Dan Philip Holbrook.)

He was there to either guide it to or from the platform, not down to it.

The Court: How can you limit it to that?

Mr. Harrison: Because the reason—we know it didn't arrive over the platform. Do you follow me on that, your Honor?

The Court: Yes.

Mr. Harrison: It is quite evident it had not arrived over the platform. The only guiding necessary at that time to get it over the platform is to stop it from swinging itself and to guide it a little bit as it approaches the platform. That has been the testimony of——

The Court: There was testimony, too, about two hands being on this.

Mr. Harrison: This particular witness did that, yes, your [541] Honor. However, there is testimony that to steady the plane as it approached the platform, it could be done by your hands on the wings or even under the wings on the skin of it.

The Court: It would depend on the conditions existing at that time.

Mr. Harrison: That is right. There has been testimony of this very witness, whose boss is the Jones Stevedoring Company, as I understand it, that it is unnecessary to go underneath the plane and hold on to the strut until it comes directly over the platform. That is his testimony. Mr. Magana has successfully made it look some other way by some skillful phrasing, but I want to ask that question again.

(Testimony of Dan Philip Holbrook.)

The Court: Very well.

Mr. Kay: I want to get this record straight, too, because I know Mr. Harrison has that theory, and he is entitled to it.

The Court: That is the theory of his case; I understand that.

Mr. Kay: But this is the testimony, your Honor—your Honor has it in mind, and it is at the very beginning of this case—Mr. Spirz's testimony. He was asked:

"Q. Now, did you see Mr. Luehr right before this accident?

"A. Well, yes, when I was standing here (indicating).

"Q. You said here, on the catwalk, you have indicated [542] the catwalk?

"A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and we waited for the plane to come down, and when the plane stopped and we were ready to take over and hold on to it, I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

"Q. Was he in a place where he was supposed to be, Mr. Spirz? A. Yes.

"Q. That was his job there?

"A. That is his job to hold on to the plane and steady it.

"Q. Was he doing what he was required to do at that particular time?

(Testimony of Dan Philip Holbrook.)

"A. That is correct."

Mr. Luehr said this, and I read this to the Court before, and I will tie it in with Mr. Harrison's cross-examination immediately thereafter:

"Q. (By Mr. Kay): Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your left hand and a hold of the [543] fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct? A. That is correct."

Then Mr. Harrison later asked him this one question and got this answer, and he picked that one answer out of context and says that was all he was going to do. Mr. Harrison—I have it here, and it is important, so I think it is worth taking a minute here.

The Court: Mr. Harrison will guide you.

Mr. Kay: He certainly ought to know where that is.

Mr. Harrison: It is in here so many times——

Mr. Kay: I think I have it here. Well, I can't find it, your Honor, but Mr. Harrison stated this, and I remember it very particularly. He asked this witness, "Your purpose in going over there was to steady this plane?" and the man said "Yes." Obviously, that is part of this whole operation.

Mr. Harrison: I also asked further, "Did you have a platform with you?" "No." "Did you have

(Testimony of Dan Philip Holbrook.)

the bolts with you?" A. "No." "Did you have a tripod with you?" A. "No." In other words, the only purpose he had there was to steady the plane. He couldn't have done any work on the platform; he didn't have the bolts, he didn't have the platform, he didn't have the tripod, anything. [544]

Mr. Resner: The trouble with this arugment is that they are omitting the ultimate fact. The efficient, proximate cause was the fact that the man released the lever and dropped the plane.

Mr. Harrison: Mr. Resner, if you are going to argue efficient, proximate cause at this time——

Mr. Resner: That is what it is about.

Mr. Harrison: This is not the time.

Mr. Resner: I understand. Why are you trying to make the Court overlook the basic factor in the case?

Mr. Harrison: Just answering Mr. Resner for one second, if I can avoid some rebuttal from him, there can be many causes of an accident. I think Mr. Schmitz gave us a pretty good analysis when he said the cause of the accident was the dropping of the airplane, and the cause of the injury was the man being under the airplane.

Mr. Resner: That is a non sequitor. If he had known it was going to happen, Mr. Harrison, he wouldn't have gone to work that day; but unfortunately none of us knows our destiny.

Mr. Harrison: Nevertheless, I think that is pretty irrelevant.

Mr. Kay: So that we finally conclude this phase

(Testimony of Dan Philip Holbrook.)

of it, I found this section. Rather, Mr. Magana was looking for it and found it. This is page 246. Mr. Harrison says:

"Q. I interpret your testimony to be, you were up [545] there to steady the airplane?

"A. That is right.

"Q. Did you have the platform with you that was going to go underneath the wheels?

"A. The platform already was underneath there.

"Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform? A. No, sir.

"Q. Were you going to fasten it?

"A. No, sir."

Obviously, at that time he wasn't, but that would be a later operation.

Mr. Harrison: Obviously at that time he wasn't, and that is exactly the point. It is also obvious from the fact that the plane fell all the way to the mechano deck it was spotted over the platform at that time, regardless what Mr. Spirz might like us to believe.

The Court: I will give you gentlemen sufficient time to argue this case after we marshal the facts. Proceed.

Mr. Harrison: I was going to straighten out with Mr. Holbrook once again—well, I will get at it this way:

Q. How low do they lower the plane, and how near does that landing gear come to the platform before the men generally go over there to fasten it?

(Testimony of Dan Philip Holbrook.)

Mr. Kay: That is a compound question. [546]

Mr. Harrison: All right.

Q. How low do they bring the landing gear down with relation to the platform before the men take hold of the landing gear to fasten it?

A. That, as I pointed out before, depends on the whistle man's judgment due to weather and conditions. Sometimes, a perfectly calm day, he might stop the plane, take it sometimes down that far (indicating).

Q. You are indicating around three inches?

A. Or say the vessel is laying in a sheltered harbor or cover, or there isn't much movement by, or he is in the stream where it sometimes becomes so rough you actually have to knock off work, he might have the plane over there four feet.

Q. Four feet?

A. Yes. Whatever the work would necessitate.

Q. Would you say the Oakland Estuary is a fairly calm body of water?

A. All depends on whereabouts in the Oakland Estuary.

Q. Do you know where Navy In-Transit Dock No. 3 is? A. Yes.

Q. Would you say that is a comparatively sheltered spot?

A. Well, depends on wind and movement of the navy tow boats over there.

Q. I don't know anything about navy tow boats and there doesn't seem to be any evidence in this case there was any such [547] thing. Would you

(Testimony of Dan Philip Holbrook.)

say the common practice in the estuary was to bring the plane down—how close would you say the common practice in the estuary is?

Mr. Kay: I don't think he can testify to that. He just stated it depends on what conditions might be, might be three inches, might be three feet.

Mr. Harrison: He did not limit it to the estuary at that time.

Mr. Kay: Then it is a matter for the whistle man's judgment. He testified to that.

Q. (By Mr. Harrison): Is it true you can't estimate what the general practice in the estuary is?

A. The estuary is quite a large body of water.

Q. I am talking about Naval In-Transit Dock No. 3, which I understand is a very sheltered spot.

A. It isn't in the estuary.

Q. It is even more sheltered.

Mr. Kay: This is getting pretty argumentative, your Honor.

Q. (By Mr. Harrison): I will ask, then——

A. It is a cove, sir.

Q. It is a cove off the estuary, isn't it?

A. Yes.

Q. And it is a very calm spot, isn't it?

A. Not always. I have seen southerly winds, it gets pretty rough there. [548]

Q. If the wind were blowing too hard, would it be the common practice of Jones Stevedoring Company to load airplanes under those conditions?

A. Well, that is another thing that is hard to say. There are a number of factors.

(Testimony of Dan Philip Holbrook.)

The Court: It would depend entirely on the degree of the storm.

A. Storm or the government, whatever they have to pay in the——

Mr. Harrison: Well, we have successfully avoided once again answering the question.

Q. (By Mr. Harrison): And that is, is it necessary for anyone to go underneath the plane and hold on to the strut before the strut arrives over the immediate area of the platform?

A. Oh, the immediate?

Q. Over the area immediately above the platform. In other words, assuming this is the platform (indicating). Say the strut is out this way, what do you hold on to?

A. When the plane comes down——

Q. I think the question is quite simple.

Mr. Kay: It is such a complex question, I think he is entitled to answer.

A. When the plane comes to a stop, supposing it is in a position to be able to reach the strut, might not be right over to an inch over the stand, but the plane has—they have to take hold of it then and get hold of the strut and have that strut [549] ready to place in position when it is——

Q. (By Mr. Harrison): When it is over the platform? A. When it comes to rest.

Q. Over the platform, that is right, and before it arrives over the platform is it necessary to grab hold of the strut?

Mr. Kay: Your Honor——

(Testimony of Dan Philip Holbrook.)

Mr. Harrison: What is the matter with that?

Mr. Kay: I will object to that as being unintelligible. He said in order to get it down on the strut they have to hold it. He says before it arrives. Arrives where?

The Court: I am glad you and Mr. Harrison are getting along so well.

Mr. Harrison: It is obvious the objection is facetious.

The Court: I will allow the witness to answer so we can get through here.

A. The strut or tripod is about 18 inches—16 to 18 inches in length, and as a rule its platform is made up of two two by twelves lying alongside of one another.

Q. (By Mr. Harrison): OK. Then it is 24 inches wide.

A. That is right. It is practically impossible to put that plane down to a stop and say that that tripod is right over that platform.

Q. Well, is it normal to stop a plane before they spot it over the platform, though? Isn't it at all times necessary——

A. (Interposing): It is necessary to—it has to stop before [550] it hits the deck—mechano deck.

Q. That is right. When they are bringing it over on the long arm and swinging around in position to lower it, it is within a very few feet of the deck and stopped? A. Yes.

Q. Assuming at the time it is stopped the wheels are nowhere in the vicinity of the platform,

(Testimony of Dan Philip Holbrook.)

is it then proper to go underneath the plane and hold on to the landing gear—necessary?

A. In my case I have never seen them go underneath when it isn't in approximate position of the landing place.

Q. In other words, if a man did go underneath it before it was in the approximate position of the landing place, you would be doing an unnecessary thing?

Mr. Resner: I am going to object——

A. No gang——

Mr. Resner: Just a moment. I would like to object. It is argumentative.

Mr. Kay: I think he is through now, anyway.

The Court: I will give you sufficient time to argue this case.

Mr. Harrison: I think Mr. Holbrook has argued it very effectively for me.

Mr. Resner: No further questions.

The Court: Step down.

(Witness excused.) [551]

Mr. Kay: Mr. Moore.

WALTER MOORE

called as a witness for respondent impleaded Jones Stevedoring Company; sworn.

The Court: Your full name?

A. Walter Moore.

The Court: Where do you live?

A. San Francisco.

(Testimony of Walter Moore.)

The Court: And your business or occupation?

A. Longshoreman.

The Court: How long have you been so engaged?

A. 25 years.

The Court: On the waterfront here?

A. Yes. Pacific Maritime Association.

The Court: You are employed at the present time by whom?

A. Pacific Maritime Association.

The Court: All right.

Mr. Kay: Your Honor, I promise I will get through with this witness a little faster than the other, and I hope other counsel will, too. I am sure they will.

The Court: Then let's admonish Mr. Harrison and other counsel.

Direct Examination

By Mr. Kay:

Q. Have you had occasion to work on [552] mechano decks such as you see over there in that model, in connection with the loading of planes?

A. Yes.

Q. Would you tell us about whether you had many ships to load of this type?

A. Yes, I have loaded several. Quite a few of them.

Q. In about what period was that?

A. That was during the war.

Q. For whom did you work on those jobs?

A. For the Army.

(Testimony of Walter Moore.)

Q. Directly for the Army?

A. Yes, the Army.

Q. Not through a stevedoring contractor?

A. No, for the Army.

Q. Can you tell us how the Army does that work?

Mr. Harrison: I object on the ground it is incompetent, irrelevant and immaterial, and there is no proper foundation laid.

Mr. Kay: All right, I will lay the foundation. We are trying to go along here.

Q. Let me show you an exhibit that has a plane, libelant's Exhibit 14. A. Yes.

Q. There is a strut on there with a tripod. Are you familiar with that? [553] A. Yes.

Q. In that operation that you have done on those several ships with mechano deck structures, have you actually worked in putting planes aboard with struts or with tripods?

A. Yes, with the tripods and with the — those just with wheels on them.

Q. In some cases they may have the wheels on, and other cases they have a tripod? A. Yes.

Q. Will you state whether or not—well, you see that picture there? You have a platform there?

A. Yes.

Q. That is the kind of thing you put the plane down on; is that right? A. Yes.

Q. Can you describe how that plane is put aboard and finally landed? Use your own words on that.

(Testimony of Walter Moore.)

A. Well, they bring it over—usually we use a barge and bring it over on the barge, and when it gets about four or five—four feet or three feet down right over this platform here, the foreman blows a whistle and they stop. Our practice, we was up on top around there, then we would go get hold of it, see?

Q. Get hold of what?

A. Get hold of those struts. [554]

Q. What did you do then?

A. Then he would lower it down. But on these tripods, they had those two by twelves, one on each side where the gear was. When that come down, these tripods, they swing and they don't land three. You have to hold it to get it between the square and see it is landed flat.

Q. Would you use your hands then?

A. Yes, use your hands.

Q. To help get it down?

A. Yes, to help get it down. We use one man on each side and we pull that straight. When she rides, you see, one corner kicks and you pull it so she lands flat.

Q. In getting them all the way down to the platform, is it necessary to help guide it down?

A. Oh, yes; you have to guide it, yes.

Q. When that first comes over and is held in the spill position, they still have to maneuver to get it in the exact spot they want it? A. Yes.

Q. Have you ever used planking on the mechano deck in doing that operation?

(Testimony of Walter Moore.)

A. Never seen it done.

Q. Have you ever done it?

A. No, I never done it.

Q. Was this the Army, directly working for the Army? [555]

A. Yes, I worked directly for the Army.

Mr. Kay: That is all.

Cross-Examination

By Mr. Harrison:

Q. Mr. Moore, is it necessary to grab hold of this strut before the landing gear of the plane arrives at a spot directly over the platform?

A. Well, all the planes I have worked on, when these fellows brought it over to us, always directly over before we got hold of it.

Q. You didn't ever grab one, then, before it arrived over the platform; is that right?

A. No, sir; come—it might be two or three feet—the strut be two or three feet away from the two by twelves, then we would grab hold and hang on to it and push it over a little bit. Just hold on to it, that is all.

The Court: Usually I should keep still, but what he said there, I didn't know they could spot them in the fashion he just indicated, right over the tripods.

Mr. Harrison: If your Honor please, the tripods are suspended from the landing gear. They just sit on the platform.

(Testimony of Walter Moore.)

The Court: I understand.

Mr. Harrison: The testimony about that, I believe, was that they lower the tripod within inches to the platform, directly over it, before they allow the men over there.

The Court: Very well. [556]

Mr. Harrison: And the witness himself testified he has never——

The Court: I am not inviting discussion.

Mr. Harrison: Yes, your Honor.

Q. (By Mr. Harrison): Mr. Moore, have you ever had occasion to be upon the mechano deck when the plane came over and started to swing?

A. I was always up on the mechano deck when it came over.

Q. Did you have to steady these planes when they started to swing?

A. Yes, we always have to steady them.

Q. Did you steady them by holding on to the tag lines, for instance?

A. Usually they are up high, they use tag lines, all depends on the fellow that is bringing the airplane in. He is the man. Sometimes they stop three or four feet above the platforms. Sometimes some of them come a little bit lower, but in no circumstances would a fellow grab it, no matter where he stopped it—it is up to that fellow. He is the fellow does it.

Q. You are talking about spotting the plane. I am talking about after the plane is stopped, and around directly over the platform and started to

(Testimony of Walter Moore.)

swing, have you ever had occasion to steady one at that time? A. Yes. [557]

Mr. Kay: That is assuming something not in evidence.

The Court: The answer is "Yes."

Mr. Kay: I beg your pardon?

The Court: The answer is "Yes." That doesn't militate against you.

Mr. Kay: Not at all. I guess I jumped the gun, your Honor.

Q. (By Mr. Harrison): In steadying the plane have you sometimes put your hand on the wing to steady it? A. Wings, any place you can.

Q. Or the body of the plane?

A. Yes, body, underneath the—what are those things again?

Q. Landing gear?

A. Where the wheels are at. I forget the name. I forget what you call those things again.

Q. Mr. Moore, are you familiar with the Pacific Coast Marine Safety Code? A. Absolutely.

Q. Are you familiar with this passage:

"When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load."

Are you familiar with that? [558]

A. Yes, that is correct. But when a load comes down, as soon as that load gets under way and stops, you grab hold. Nobody stands below. [558-A]

(Testimony of Walter Moore.)

Q. Don't stand underneath the load?

A. No.

Q. You think it would be proper to stand underneath the airplane?

A. That is a different thing altogether. I have loaded airplanes on these, and I have loaded them on these airplane carriers, when an airplane on an airplane carrier, those ships, you have to get underneath that plane as soon as it comes down, and on some of these planes, there is only about six inches when it comes down, no ropes, ropes do no good, because you can't pull, you go inside and get hold of the strut and hold the plane, you are underneath the plane.

Q. You are underneath the plane. Isn't it true that a strut itself would stop the plane from stopping only if it fell; it would fall on its landing gear?

Mr. Kay: You might have a 16-ton plane, smash through. That is calling for his conclusion.

Mr. Harrison: I am quite sure your Honor will take judicial notice of the fact that a plane is quite capable of landing on its own landing gear.

The Court: Will you read that rule, the slings?—read that.

Mr. Harrison: "When assisting to steady in hoisting or landing a sling load"——

The Court: Is this a sling load? [559]

Mr. Harrison: The plane was slung on a sling.

Mr. Resner: It is not a sling load; a sling load is a pallet board that has cases with sacks on it.

The Court: Yes.

(Testimony of Walter Moore.)

Mr. Harrison: How would you define the way this plane was slung?

Mr. Resner: This was an airplane, Mr. Harrison.

Mr. Harrison: Define how it was slung.

Mr. Resner: It was suspended on the fall, suspended from the boom operated by a crane driver employed by you, directed by a whistleman employed by you, who carelessly did the work and dropped the plane, period.

Mr. Harrison: Your Honor, please——

The Court: I never saw this witness before, he is a longshoreman; is this a sling load, this airplane?

The Witness: Well, I wouldn't know what you call it; I guess anything they call hanging a hook a sling load.

The Court: That is the answer for you.

Mr. Harrison: Thank you, your Honor.

The Court: Take the witness.

Mr. Harrison: I have a couple more questions.

The Court: All right. From time to time I have been down at the waterfront, and I believe, as counsel says, that a sling has sacks, whatnot on it, and what are those things?

Mr. Resner: Boards, pallet boards. [560]

The Court: Pallet boards, yes. I have seen so much of that maybe I have been led astray.

Mr. Harrison: They referred during the course of the trial, referred to the men that hook the plane on at the barge as slingers, and I think that they

(Testimony of Walter Moore.)

(Question read by the Reporter.)

The Court: Can you answer that?

The Witness: Well, I guess——

Q. You guess?

The Witness: Well, that—it is meant that there shall be no holes so you would fall through.

Q. (By Mr. Harrison): Then the reason that this rule is here is to avoid having open spaces that will—that men can fall through; is that your testimony?

Now, doesn't a mechano deck provide a lot of open spaces? A. Nothing but open spaces.

Q. Nothing but open spaces. Mr. Moore, do you know how wide a strongback is?

A. How wide?

Q. Yes, generally speaking; I know they come in various widths.

A. They come in various, different sizes, I would say, about six inches, the average.

Q. About six inches?

A. You mean the width of it? [563]

Q. The width of it, yes.

A. About six inches.

Q. I read to you this rule, Mr. Moore——

Mr. Kay: What is it?

Mr. Harrison: 820.

Q. "Employees shall never ride strongbacks or beams; nor shall they unnecessarily walk on or climb upon those in place."

(Testimony of Walter Moore.)

Is one of these beams any wider than a strongback?

A. Well, I think some of those beams I looked at they were wider than a strongback.

Q. How much wider?

A. At least they are flat. Well, I should say about—it has been quite a while since I have been on them, but I know I have worked on them.

Q. The beams in this particular instance are ten inches or——

A. I say about ten inches, eight or ten.

Q. And the strongback?

A. About six inches.

Q. Do you know how wide the fore and aft beams are on these mechano decks? A. How wide?

Q. Yes.

A. I don't remember exactly, it has been quite a while. [564]

Q. Six inches, is it; all right.

A. Well, I wouldn't say for sure; it was all about the same, I think.

Q. You think they are all about the same?

A. Well, it has been quite a while since I have worked on one of these ships.

Q. How many of those ships have you worked on?

A. I have at least worked on half a dozen or more.

Q. At least a half a dozen?

A. Every time I have worked they were in there.

Mr. Harrison: I believe that is all I have.

(Testimony of Walter Moore.)

Mr. Kay: Just a couple of questions.

The Court: What is that?

Mr. Kay: Just a couple of questions.

The Court: All right.

Mr. Kay: May I have that book?

Redirect Examination

By Mr. Kay:

Q. By the way, when you worked for the Army you worked for a walking boss employed by the Army? A. Correct.

Q. Did he ever suggest or direct you to put planking on the—— A. No.

Q. ——on the mechano deck? Now, Mr. Harrison read you a rule, but he didn't read all of it, that is Rule 911. We will read the whole rule. [565]

"When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load."

And that part is what Mr. Harrison left out.

Mr. Harrison: That is the only part I left out, "face the load."

Mr. Kay: Let me finish. This is the significant part, and I think you are familiar with this rule:

"Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

Is that right? A. Correct.

(Testimony of Walter Moore.)

Q. And that represents the same situation that you have to take hold of the plane——

Mr. Harrison: Your Honor, this plane was not a draft; maybe a sling load, but not a draft.

Q. (By Mr. Kay): Draft or sling loads, we won't quibble over drafts; the same situation would apply to a plane that is shoulder high?

A. Correct.

Mr. Kay: That is all.

The Court: Any questions? [566]

Mr. Resner: No, Judge.

The Court: You may step down.

The Witness: Okay, your Honor.

The Court: Is that enough for the day, gentlemen?

Mr. Kay: Your Honor, it would be except for one thing. If I may indulge in the Court's time for a little bit, try to get through in this ten minutes we have left, but we have Mr. Bauman, a walking boss from Los Angeles. We thought we would get somebody from that area on this particular question, and if we can't put him on today we will have to have——

The Court: Where from?

Mr. Kay: Los Angeles. I shouldn't have mentioned that.

The Court: All right.

JAMES AUGUST BAUMAN

called as a witness on behalf of the respondent-impleaded; sworn.

The Court: What is your full name, sir?

The Witness: James August Bauman.

The Court: Where do you live?

The Witness: Los Angeles.

The Court: What is your business or occupation?

The Witness: Foreman, supervisor for Association Banning Company.

The Court: And how long have you been so engaged? [567]

The Witness: I have been since 1915. I started in San Francisco, and I was transferred to Los Angeles in 1926.

The Court: All right, proceed.

Direct Examination

By Mr. Kay:

Q. Mr. Bauman, you had worked as a longshoreman; I imagine you started a long time ago, did you? A. Yes, sir.

Q. How long? A. Since 1915.

Q. And you have worked yourself up to the position of walking boss? A. Right.

Q. Now, how long have you been with the Associated Banning Company? A. Twelve years.

Q. Down in that area did they do any loading on mechano decks, these planes on mechano decks?

A. Yes, sir.

Q. And that model you see over there fairly

(Testimony of James August Bauman.)

represents a portion of one? A. Yes, sir.

Q. Now, will you tell the Court whether—well, let me go back a minute. About how many of these vessels did you work on?

A. Well, I would judge around 90, 100.

Q. And on any of those vessels did you ever use planking in [568] connection with putting on planes? A. Absolutely not; no.

Q. And why not, Mr. Bauman?

A. Well, it is a hazard, dangerous. We never even tried it.

Q. Why? Why is it a danger and a hazard?

A. You take planking on top, you're shifting your beams all over the ship, they are loose, might fall off, be unbolted, and if you put any planking on top of that where you move your beams, I don't know what you would do with the planking underneath it.

Mr. Harrison: May I ask, the last question Mr. Kay asked, would he clarify it when he says "planking"? Did you intend to infer a solid planking deck or just a few planks, two planks, one plank?

Mr. Kay: The Lord only knows. That is the contention of the Government and I would like to know just what they mean. That is their position, that is——

The Court: Develop that on cross-examination.

Q. (By Mr. Kay): Did you ever use any planking at all, Mr.——

A. None whatsoever outside of—beg your pardon, outside of where I put cases.

(Testimony of James August Bauman.)

Q. Cases?

A. Yes, taking these parts, the planes we take off the planes, where we put them on the ship.

Q. For the cargo? [569] A. Yes, sir.

Q. And you have those platforms to put the struts down on; is that right?

A. That is right.

Q. And then on some of these planes did you land them with wheels?

A. No, sir; everything was—ours was with the stands.

Q. With the struts? A. That is right.

Q. Is it similar to the strut you see in Libelant's Exhibit 14 here?

A. That is exactly what we use, a three-corner strut.

Q. Tell the Court just how you would land that plane, assuming we got the plane over the area that you are going to land it, how far would that plane be lowered, approximately, and what would the stevedores do in assisting to get that finally on its resting place?

Mr. Harrison: What kind of planes?

Mr. Kay: Well, any kind. I think we are agreed that the operation is substantially the same on all planes, your Honor.

Q. Am I right on that?

A. Yes, sir; very correct. You bring the plane off the barge?

Q. Yes.

A. We always have different signals, and use electric signals [570] with ours, same thing as giv-

(Testimony of James August Bauman.)

ing a whistle or other signals. They bring that plane in there to approximately where the plane will go, drop it down to about two feet, depends on how much you have to move it, and then let it stop, and then everybody, the two men have each stand, come over and steadies that plane. Then you have to go forward or aft, port or starboard, maybe a foot or eight inches, then let it down within two, three inches. I think the stands we use, six by six's, use six by six's instead of the planking like it is here.

Q. For the strut to land on, the platform to land on? A. Right.

Q. Now, when you mentioned that you moved a foot or eight inches, something of that sort, when that plane is brought over the approximate area is it always put directly over that spot, that landing with that precision? A. That is impossible.

Q. Yes? A. Impossible.

Q. Put it in the approximate area?

A. That is correct.

Q. And then you mentioned that you have to help to guide and steady that down?

A. That is right, that is what got the men there for, take off our guy lines and as soon as the men get on the stands, and then whatever position we have to put the man to steady the [571] plane to put her in place.

Q. Will you state whether or not it is customary in the Los Angeles area to hold onto the strut itself in helping to guide that down?

(Testimony of James August Bauman.)

A. Positively.

Q. And when that plane has gotten down to the position where the men can grab that plane do you use these tag lines any more?

A. No, we discard the tag lines and take them off, no good to us any more, absolutely useless to us.

Q. The question of getting that plane down involves both the steadying and the guiding to that particular spot, even if it is a foot or so off the platform, that is, off the top of the platform?

A. Absolutely.

Mr. Kay: Thank you.

Cross-Examination

By Mr. Harrison:

Q. Have you discussed this matter before you came here with Mr. Kay?

A. I talked with the man over there, yes.

Q. How long did you talk it over?

A. About four or five minutes, something.

Q. Is that the only time you have seen him?

A. Yes, sir.

Q. Why did you come up here from Los [572] Angeles?

A. Well, my — some attorneys connected with this company were — I guess, he asked me if I wouldn't go up there, I have done this kind of work pretty close to three years.

Q. Did you talk to the attorneys down there?

A. There, yes, sir.

Q. About what you would testify up here?

(Testimony of James August Bauman.)

A. No, just asked me, told me that had some trouble, some man got hurt and says if I would go up for the company to testify.

Q. I see. Did he tell you that it involved the mechano deck? A. Yes, sir.

Q. Did he tell you it involved the dropping of an airplane? A. Yes, sir.

Q. What else did he tell you?

A. That is about all. I understand somebody was hurt, this man told me about it.

Q. Did he ask you whether walking boards were used? A. Yes, sir.

Q. They did? Now, I asked you what else they talked about. Tell us some more.

Mr. Kay: You asked him what he talked about to counsel.

Mr. Harrison: Counsel in Los Angeles, too.

The Court: I know you did, but you didn't ask him the direct question, whether or not—what was said.

Q. (By Mr. Harrison): What was said with counsel in Los [573] Angeles, as much as you can remember?

A. Well, he asked me if we used any boards in the structure. "No, what do you want boards for, planking?"

Q. Why did counsel from Los Angeles approach you, do you know?

Mr. Kay: Your Honor, that is certainly objectionable. Why? We are looking for witnesses to produce testimony here.

(Testimony of James August Bauman.)

The Court: He is loading this type plane for three years, he says.

Mr. Harrison: I just—I would like to know whether there was any specific reason for his being employed by counsel.

The Court: Very well; ask him.

Q. (By Mr. Harrison): Do you know of any specific reason that they——

A. The only specific reason I know is what—why, he wanted to know if I think using planking on these tanks would be safe, and I says absolutely not, we never allow or used them. We never used them.

Q. You don't know why they asked you?

Mr. Kay: Your Honor, I am going to object to that; that is enough of that.

The Court: The fact that he asked him, I don't think it is possible to prove any more than that, is it? [574]

Mr. Harrison: Well, perhaps——

The Court: Maybe they had a motive, maybe they didn't. But can this witness—did they talk to you more than once?

The Witness: No, sir.

The Court: How long did they talk to you?

The Witness: Well, about five minutes.

Q. (By Mr. Harrison): And then they put you in an airplane and sent you up here?

A. Yes, sir.

Mr. Kay: Your Honor, that is not so. I mean, this man testifying——

(Testimony of James August Bauman.)

Mr. Harrison: Go ahead and explain.

Mr. Kay: I will object, and I think the record will sustain me, that he talked to me for about five minutes, that he had talked to our attorneys in Los Angeles, and they sent him up here.

The Witness: That is correct.

Q. (By Mr. Harrison): How long did you talk to the attorneys in Los Angeles? That is the Judge's question.

A. Well, he asked me to come over to the office, and I probably been there five minutes, a little bit more——

Q. Only five minutes in the office?

A. Ten minutes, I didn't keep track of my time.

Q. But you weren't there very long?

A. No, I wasn't. [575]

Q. And then they put you on a plane?

A. No, they tell me, says, "We're going to have a trial in San Francisco; want you to go up there as a witness."

I says, "Well, if my company will spare me, not too busy, I will be willing to go."

He called me up and says, "Come over to the office, make reservation and be up here on the 19th, and was, come up on the 18th"—— [576]

And he says, "How you going to go up?" And I says, "Well, I prefer by plane." "If the weather condition is not impossible, to let me come up any other way," and he called up the hotel, Wilton Hotel, gave me a reservation for that, and got the airplane.

(Testimony of James August Bauman.)

Q. Who was this gentleman that did all this, who did all this down south? A. Mr. Roberts.

Q. Roberts? A. Yes, sir.

Q. Do you know who he works for?

A. Well, he is our insurance attorney down there.

Q. He is your insurance attorney?

A. Well, my insurance—I know he handles insurance.

Q. For the company for which you work; is that right?

A. Well, I don't know whether he does—I couldn't say that, I wouldn't swear to that.

Mr. Kay: Your Honor——

Mr. Harrison: I am asking the questions, please.

Mr. Kay: I know, but you're getting this man into something he knows nothing about. I will state for the record we have nothing whatever to do with Associated Banning Company.

The Witness: No, I don't know.

Mr. Kay: Nor does Mr. Roberts, whom I happen to know about. [577]

The Court: Do you know what occurred to me? Maybe it is altogether a state of mind; I wouldn't think much of anybody that wouldn't prepare his witness and familiarize himself with what he is going to testify, no matter who it was. I don't think the case can be properly prepared, and yet repeatedly we are examining these witnesses, and sometimes there is good reason for it, but it rarely develops.

(Testimony of James August Bauman.)

Now, I can understand, however, how everything that happened here could have happened very innocently.

Mr. Harrison: Oh, I'm sure of that, your Honor. The only thing I was trying to establish was possibly there was an employee-employer relationship.

The Court: That is all right, you have a right to show that, show any interest that the witness may have in the result of the trial.

Q. (By Mr. Harrison): Now, sir, you have described an operation of loading airplanes whereby you said when the planes are swung over above the mechano deck and then are lowered down into position where they are to be spotted, it is at that time that the men then approach the plane, is that right?

A. The minute the operator stops the plane in that particular instance, why, the men, they are always standing aside until the plane gets back, like, aside two or three feet, all depends on the operator, stops approximately that distance, and the man gets on the stands. [578]

Q. How do you get there, how—walk over to the plane? A. On the mechano deck.

Q. Of course, on top of the mechano deck beams?

A. That is right.

Q. Is there anything to hold onto on those beams? A. No, nothing to hold onto.

Q. He can take hold of the plane; is there anything you can steady yourself with?

A. Steady yourself on the plane.

Q. On the plane itself? A. That is right.

(Testimony of James August Bauman.)

Q. Nothing else to hold onto?

A. That is right.

Q. And these mechano deck beams are how high above the main deck? A. Oh, nine feet.

Q. And when the fore and aft beams are loosened, are they a steady platform to stand, loosened so they keep moving? A. Yes, sir, but——

Q. They don't wobble?

A. The weight is enough to hold them, don't wobble.

Q. Your weight?

A. No, the weight of the beam holds itself in the slot where you got bolts, two double bolts at both ends.

Q. Mr. Witness, I had occasion to go out on one of these [579] with the captain, just loosened the beams, and I stood there, and I have a picture of myself standing on them, and I thought it was very wobbly. Is it your testimony they are not wobbly?

A. No, they are not.

Q. They don't wobble at all?

A. I have walked on hundreds, I never noticed one wobble yet.

The Court: What is the distance between?

Mr. Harrison: It is twelve feet between the thwartship beams, they were twelve feet from here to here (indicating on the model).

The Witness: That is correct.

The Court: Now, what is——

Mr. Harrison: These beams are approximately thirteen feet long.

(Testimony of James August Bauman.)

The Court: Thirteen feet long. And what are the dimensions?

Mr. Harrison: The beam here is six inches in width.

The Court: Yes.

Mr. Harrison: And as I say, I think it is between thirteen and fourteen feet long; the space in between is twelve feet.

The Court: That would be, the beams would—that thirteen feet total dimensions?

Mr. Harrison: The beams, they are thirteen feet long, your Honor.

The Court: The ones—— [580]

Mr. Harrison: Thwartship beams.

The Court: Going the other way?

Mr. Harrison: Fore and aft?

The Court: Yes. Six?

Mr. Harrison: Six inches wide and—I have the dimensions.

The Court: Six inches wide and——

Mr. Resner: If your Honor will allow me to help Mr. Harrison——

Mr. Harrison: I have them right here.

Mr. Resner: Here are two photographs. We will offer them on libelant's case. We have pictures showing the beams on the Shawnee Trail.

The Court: Did you see those pictures?

Mr. Harrison: No, I haven't seen these pictures.

The Court: Look at them, see if they are——

Mr. Kay: I think we can stipulate, all counsel

(Testimony of James August Bauman.)

will stipulate these are metal beams, all these that we are talking about are metal.

Mr. Harrison: Yes, they are. This doesn't indicate which beam——

Mr. Resner: All you have to do is look at it, Mr. Harrison, to tell it is one of the movable beams.

Mr. Harrison: Well, let's see what it is.

Mr. Resner: You can see it fits into the slot beam; the [581] slot beam is the stationary beam, and the single beam is the movable beam, and this is over the slot beam.

Mr. Harrison: Your Honor please, the picture shows just as I stated, it is six inches in width.

The Court: All right.

Mr. Resner: I don't think there is any quarrel about it.

Mr. Harrison: The judge asked me, you asked me for the further dimensions, your Honor?

Mr. Resner: I might tell you, your Honor, that the single beam is the movable beam, and the slot beam, the double one, is the solid one.

Mr. Harrison: Your Honor please, would you like some further dimensions on this?

The Court: What is it?

Mr. Harrison: The specifications which I have, your Honor, show it is six inches in width; it is also six inches in height, and it is thirteen feet long.

The Court: The dimensions of the cross——

Mr. Harrison: The thwartship beams?

The Court: Yes.

Mr. Harrison: Are fourteen and a half inches in

(Testimony of James August Bauman.)

width, your Honor, this way (indicating) and they are 32 feet long, and the distance between them is twelve feet.

The Court: All right.

Mr. Resner: What numbers are the two pictures? [582]

The Clerk: Libelant's exhibits 38 and 39.

Mr. Resner: May they be received, your Honor?

The Court: They may.

The Clerk: Admitted and filed in evidence.

(Whereupon the two photographs referred to were received in evidence as libelant's exhibits 38 and 39.)

Q. (By Mr. Harrison): And is it your testimony that you walk about these beams and perform the operations of steadying and landing these airplanes without any support whatsoever?

A. Yes, sir.

Mr. Harrison: Thank you, that is all.

Mr. Kay: One question.

The Court: What is that?

Mr. Kay: One question, may I, your Honor?

The Court: I didn't hear you.

Mr. Kay: This will be just one question.

The Court: All right.

Mr. Kay: I assure you.

The Court: I wanted to be sure.

(Testimony of James August Bauman.)

Redirect Examination

By Mr. Kay:

Q. All of these ships that you were on, you said 90 to 100, doing this operation, did you ever see or know of any accident to any of the stevedores working on there? A. No, very fortunately not.

Mr. Kay: That is all. [583]

Mr. Harrison: That is all.

The Court: Thank you.

The Witness: Thank you.

The Court: We can adjourn until Monday morning at ten o'clock.

(Whereupon an adjournment was taken until March 24, 1952, at ten o'clock a.m.) [583A]

Monday, March 24, 1952—10 o'Clock A.M.

The Clerk: Frank Luehr vs. United States of America, American Pacific Steamship Company vs. Jones Stevedoring Company, on trial.

Mr. Resner: Ready.

Mr. Kay: Ready.

Mr. Harrison: Ready.

Mr. Cooper: Ready.

Mr. Kay: May we proceed, your Honor? Call Mr. O'Brien.

TIMOTHY WILLIAM O'BRIEN

called as a witness on behalf of respondent-impleaded, sworn.

The Clerk: Please state your full name to the Court.

(Testimony of Timothy William O'Brien.)

A. Timothy William O'Brien.

Direct Examination

By Mr. Kay:

Q. Mr. O'Brien, what is your present situation?

A. I am presently the attorney for the California State Employees Association.

Q. And prior to that?

A. I was Deputy Attorney General in the Attorney General's office, Sacramento; civil service.

Q. When was that, Mr. O'Brien?

A. I joined the staff there in January, 1949, and separated in May, 1951, to take my present position. [584]

Q. So now you represent the State Employees Association? A. I do.

Q. And before you became associated with the Attorney General's office, what was your occupation?

A. Well, going back, during World War II, I was originally assigned to the Stockton in-transit depot and then transferred to San Francisco in May of 1942. I was then assigned to the Port Air Office which subsequently became Pacific Overseas Air Service Command. My assignment on joining the staff of the Port Air Office was to Oakland outer harbor where the Air Force maintained a liaison office to handle contacts between the water division of the Transportation Corps, the United States Navy, private operators and the Air Force.

(Testimony of Timothy William O'Brien.)

In that capacity I handled all Air Force loading for various destinations, both of assembled aircraft, boxed aircraft, parts, and the entire field, which might go all the way from your radio parts to your A-26's, which were loaded on the decks of aircraft carriers at Alameda.

Q. And in that connection, Mr. O'Brien, I assume you had experience in loading the planes on mechano decks such as we have in that model over there, is that correct?

A. Yes, the mechano deck, if my recollection serves me correct first came into use in 1943, about '43. In the early part of the war I had no contact with that type of deck. However, in 1943, the same appeared and we loaded a great many [585] ships with assembled aircraft, mainly P-38's, P-47's that had mechano decks. All, of course, were tankers.

Q. Then it would be—would it be proper to say that you loaded many, many tankers, that is, you have loaded planes of various types on many, many mechano decks?

A. Yes, I had. I wouldn't want to give an exact figure, but I could approximate that there were a great many, at least one every week or two.

Q. And are you familiar with the type of plane that is here on Libelant's Exhibit 14?

A. Looking at it it is obviously an F—it is obviously a jet aircraft, and I notice from the mark on the fuse it is an F-80.

Q. Thank you. Did you have experience in the loading of planes from a barge alongside the tanker?

(Testimony of Timothy William O'Brien.)

A. Yes, that was the method we adopted for bringing aircraft from the processing depot to the ship for loading.

Q. And would you state whether or not the loading operation would be substantially the same regardless of the type of plane, that is, where you used a crane, a barge crane?

A. Yes, the loading operation for tanker loadings was done by barge crane from the offshore, and as the barge would be brought alongside by a tug, and would be made fast with necessary lines, and then the—that is, the derrick barge would be, and then the aircraft brought alongside the derrick [586] barge, lifted from the barge where the aircraft were to the tanker.

Q. Could you describe to the Court just how that operation would be done, please?

A. In sequence of time, initially a tanker would be brought to the dock. Generally when we received it they were loaded. We would then—then the derrick barge would be brought alongside. I have seen this done both with the crane derrick barge, and with the type that Haverside has in San Francisco.

Q. Pardon me, just a moment. This crane that is shown in these photographs, are you familiar with that?

A. Yes. The Army had one of very similar structure at Outer during the war. I am not sure whether it is an identical barge, but it was very similar. That barge would be brought alongside, and then the aircraft would be brought alongside

(Testimony of Timothy William O'Brien.)

offshore, the barge, and the whole group had to be lined up as to how they were going to start to stow.

Then we would have stevedores, both on the deck of the ship and on the barge, which was offshore of the derrick barge. The plane would be released from its moorings on the offshore barge, after your bridle had been attached, and your line had been dropped from the crane and attached to the bridle. Then there were tag lines attached to the aircraft to prevent it swinging in the wind and to control its general movement, as you moved it from the offshore barge to the deck [587] where it was going to be stowed.

Then the entire operation was controlled by a boss who had a whistle, and he would control by the notes on these whistles the motions of the derrickman who sometimes wasn't in a position to completely observe the entire operation.

Then following his signals the aircraft would be lifted from the barge. On this we had various types of bridles, depending upon the aircraft being loaded. It would be slung across and brought aboard, or not aboard, but over the tankers. It would then be guided into general position above the point where it was finally designated to come to rest.

Well, at this point I had better fill in the fact that there were prepared platforms, these little platforms for resting the struts, with their little special frames for lag screwing those struts to the deck.

Q. Pardon me, would that be the same as what we call tripods?

(Testimony of Timothy William O'Brien.)

A. Yes, we called them tripods then. I might fill that in by way of background. In the processing operation our general procedure was to process the aircraft for shipment at Day Brothers who operated a hangar at the Oakland Municipal Airport. The barge would then be brought to the Oakland Municipal Airport and the aircraft would be lifted from the dock to the barge. At the time this transfer took place from the dock in Oakland the wheels were removed and tripods were put on. Also on the strut you would put a collar around the strut, [588] they called it, in order to fasten your lashing lines for the purpose of securing the aircraft to the deck of the tanker, or to any other type of deck you were working on.

Now, to go back to the aircraft, the aircraft would come over the deck of the ship, already had the collar on, and the tripods on. Then we would start to lower and it would come down toward the deck.

Now, the mechano deck had a certain problem in that we never had everything in exact position as to —so that the platforms to which the airplane was being loaded would exactly coordinate with the part of the airplane we had to get on the platform, namely, your landing gear assemblies.

When it came down to a certain point, generally it was high enough so you could walk in under the aircraft while working on these irons which makes up the mechano deck. Then you would go underneath, line it up, and then bring it down. There were two reasons you had to go under, one was to

(Testimony of Timothy William O'Brien.)

line it up so they are square on the platform, and secondly, the tripods weren't perfectly balanced, so that if you didn't exactly set them in line as you dropped it onto the deck, the natural result it would come up with a little angle one way or the other. But that is substantially the procedure the stevedores did, they did go in under the aircraft, grabbed the landing gear, guided her into the final position, and then dropped her on the deck, meaning onto the prepared platform, [589] making sure the tripod was absolutely flat.

Q. Now, let me ask you, Mr. O'Brien, assuming that the plane wasn't just over that platform, as you mentioned, you can't get them, just off, say it is off a foot or so off to the side of it, and it has been stopped by the whistleman, at a height allowing the men to hold onto the plane, or the strut or gear, now, will you state whether or not in the course of that operation it would be necessary to have men to get hold of the plane at that point?

A. It would be, because the aircraft was never allowed to swing free once it came in any area where it could come in contact with an obstruction; of course, the best thing to hang onto under those circumstances would be the struts and the other—well, that would be the only thing underneath you could have grabbed.

Q. In all of these operations, Mr. O'Brien, can you recall any instance in which planking was ever used on the mechano deck other than these platforms that I am speaking of?

(Testimony of Timothy William O'Brien.)

A. None in the loading of the aircraft whatsoever.

Q. I will ask you this, Mr. O'Brien: Is a plane load such as the plane here that would be coming down to the mechano deck, that is, that plane coming over, would you call that a sling load?

A. No, I had understood it was a lift load. To me a sling load contemplates a duckboard, pallet board, something of that [590] sort, which is a different type of operation.

Mr. Kay: That is all.

Mr. Harrison: You have any questions?

Mr. Resner: No questions.

Cross-Examination

By Mr. Harrison:

Q. You're an attorney, Mr. O'Brien?

A. I am.

Q. Where do you presently reside?

A. 4610 Marian Court, Sacramento.

Q. Sacramento. Did you come down here to testify in this case? A. I did.

Q. How old are you, Mr. O'Brien?

A. I am thirty years of age.

Q. Where did you go to law school?

A. University of San Francisco.

Q. When did you get out, Mr. O'Brien?

A. I graduated in March—in June of 1948.

Q. June of '48. You're thirty years of age, so in 1943 when you first came in contact with mechano

(Testimony of Timothy William O'Brien.)

decks you were how old? Let's see, that is——

A. Either be 21 or 22, according to my mathematics.

Q. About 22 years old; is that right?

A. Yes.

Q. You say you were supervising the loading of these airplanes? [591]

A. I did not say I was supervising, I did supervise on behalf of the Air Corps. The actual lift operation was directly the responsibility of the Army Transportation Corps.

Q. How long were you in the—were you in the Service at that time?

A. Well, I was exempt as being in essential work until October of '43.

Q. I see.

A. At which time my draft board required my presence in the Army. I was inducted and reassigned to my previous assignment identically at the Oakland Outer Harbor.

Q. What was your rank, Mr. O'Brien?

A. I was a staff sergeant at induction.

Q. You were a staff sergeant? A. Yes.

Q. And you would like us to believe that a staff sergeant, a 22-year-old staff sergeant had the responsibility and the direction of loading these airplanes?

Mr. Kay: Just a moment. That is incompetent, irrelevant and immaterial, improper cross-examination, argumentative. This witness has told what his duties were, now he is arguing the point.

(Testimony of Timothy William O'Brien.)

The Court: Goes to the weight of the testimony; I will allow it.

The Witness: Is that a question? [592]

The Court: Just a moment. Read the question.

(Question read by the Reporter.)

A. Well, that—my responsibility was to represent the Air Force in all of those loadings at Oakland Outer Harbor. I reported directly to Lieutenant Colonel F. I. Nystrom, I was neither assigned to a squadron of any type or to the headquarters, I was left completely on my own. I reported to no squadron, no first sergeant, or anything of that type.

Q. (By Mr. Harrison): Do you know whether or not Mr. Nystrom ever testified in this case?

A. I talked to him on the telephone, I was in Long Beach at the time, and he phoned me and asked me if I would come up and testify as to my recollection concerning the—and experience concerning the loading of assembled aircraft on a mechano deck.

Q. You worked under Mr. Nystrom?

A. I was responsible directly under F. I. Nystrom, Jr.

Q. Now, you said you were associated with loading these airplanes at least one every two weeks, I believe that is your testimony?

A. That would be approximate, I don't know how many tankers I actually loaded or inspected. There were a great number.

(Testimony of Timothy William O'Brien.)

Q. Yes. How long did you work in that occupation?

A. I first became associated with that directly in December, 1941, Stockton in-transit depot. I left San Francisco in [593] April, 1945, on an overseas assignment to the A-4 section, which is a supply section of 308 Bombardment Wing, which operated as advance command for the Fifth Air Force. In that operation I was directly concerned with water transportation, but not with the handling of assembled aircraft, because most of our movement had to do with LST's, the airplanes flying from point to point.

Q. Then you say you first became associated with the loading activities in 1941, but you didn't see a mechano deck until 1943, is that right?

A. That is my recollection.

Q. You went overseas in '45? A. I did.

Q. Did you see mechano decks during the course of your—those two years from '43 to '45?

A. I saw a great many mechano decks during that period.

Q. And during that period you were 22 years old and you came to be 24 during that period, is that right?

A. Well, that would be approximately correct.

Q. Did you ever go up in grade above the staff sergeant?

A. I received an appointment to OCS, but they closed OCS for the Air Corps in that particular category, they wouldn't release me to OSC in the

(Testimony of Timothy William O'Brien.)

Transportation Corps. Overseas I was promoted to a tech sergeant.

Q. I see. Never became a commissioned [594] officer? A. I never did.

Mr. Harrison: I believe that is all.

Mr. Resner: No questions, your Honor.

Mr. Kay: I have no further questions. I wonder if we may ask for a recess now. There is another witness I had hoped would be here, and we can check on it.

The Court: Take a recess.

Mr. Kay: Thank you.

Mr. Mordock: I believe Mr. Cooper may possibly want to ask this witness some questions.

The Court: You can ask the questions in the absence of Mr. Cooper.

Mr. Mordock: Your Honor, I am not familiar with what he has testified, I am not familiar with what he testified, I just came into the courtroom.

The Court: You just came in?

Mr. Mordock: Mr. Cooper just stepped out. In case he does, I would like to reserve that until——

The Court: You take that up with Mr. Cooper, and I will give you the opportunity, and you can take the place of Mr. Cooper in his absence.

Mr. Mordock: Very well, sir.

The Court: I will encourage you to do so.

(Short recess.) [595]

Mr. Kay: Your Honor, this witness we had in mind, which is for cumulative evidence, hasn't

(Testimony of Timothy William O'Brien.)

shown up. We have another witness, but I understand Mr. O'Brien was to be cross-examined by Mr. Cooper.

Mr. Harrison: I would also like to ask one or two questions of Mr. O'Brien.

The Court: Take the stand.

(Thereupon Timothy William O'Brien was recalled as a witness for the respondent-impleaded, previously sworn.)

Cross-Examination
(Continued)

By Mr. Harrison:

Q. Mr. O'Brien, I believe that Mr. Kay showed you Respondent's Exhibits B-1 and asked you to identify that airplane, is that correct?

A. No, he showed me 14.

Q. Can you identify that plane (handing photograph to witness)?

A. It looks most like an F-88 to me, although there is a central air scoop on both the F-88 and the F-80.

Q. Mr. Kay showed you Libelant's Exhibit 14, which you identified as an F-80?

A. Yes. That was from the markings on the fuse.

Q. I see. Now, does the trailing edge of the wing appear in that picture, Mr. O'Brien?

A. The trailing edge, as I understand it, is this part of the wing right here (indicating).

Q. Yes. That is the trailing edge of the wing, is that right? [596]

(Testimony of Timothy William O'Brien.)

A. Yes, as I understand it.

Q. How thick is the trailing edge of the wing, do you know, Mr. O'Brien?

A. On what aircraft, sir?

Q. On this particular aircraft.

A. I don't know. I have never had personal contact with an F-80. I believe it would be similiar to the aircraft—other aircraft. That is, the forward part of the wing streamlines back to the back part of the wing, some, maybe breaks off just as thin as is practically possible within structural limitations.

Q. I see. You were indicating something under an inch, is that correct?

A. As I remember it, it was.

Q. It is under an inch thick, is it?

A. Of course I have had no personal contact with an F-80, because——

Q. (Interposing): From this picture how thick does it appear?

Mr. Resner: I am going to object to that. The witness has stated he is not able to tell, and obviously one looking at a picture which is not to scale cannot testify and give an intelligent answer.

Mr. Harrison: Why isn't a picture to scale? I don't understand that, your Honor.

Mr. Resner: I am sure there isn't a man in the world [597] who can do that, Mr. Harrison.

Mr. Harrison: Well——

A. It appears to be quite thin structurally as

(Testimony of Timothy William O'Brien.)

compared to the rest of the airplane, is about the best answer you can make.

Q. (By Mr. Harrison): I see.

A. I haven't put any measuring gauge on it at the exact ending of it.

Q. Is it at least thin enough so that a man's hand would fit over it, is that correct, in the manner which I have demonstrated?

A. It is thinner than that.

Q. It is thinner than that? A. Yes.

Mr. Harrison: I see. I believe that is all I have.

Mr. Cooper: I have only one question, your Honor.

The Court: What is that? What did you say?

Mr. Cooper: I may have, perhaps, only one question. It may be of some assistance here and may not. I submit the question.

Cross-Examination

By Mr. Cooper:

Q. Young man, from your experience and observation, how many tag lines are customarily attached to a plane of this general type in landing it on deck?

A. Of that general type, with tricycle landing gears, we had [598] there, were, I believe, three tag lines attached as your point of contact to the protruding struts.

Q. That was going to be my next question. Where are the tag lines usually attached?

A. You had to attach them, as I remember it, right on the aircraft. We would attach them to the

(Testimony of Timothy William O'Brien.)

struts, which form a "V," so you could put your necessary——

Q. (Interposing): Will you tell us at what particular point of the struts they are attached, usually?

A. As I remember that, we tied them to the tripod.

Q. A tripod I visualize as being like the thing a photographer uses. It has a leg on it, hasn't it?

A. It has three legs. The bottom structure going around——

Q. (Interposing): When you attach them to the tripod, that does not mean anything to me. What point of the tripod is it, usually?

A. There is no particular point. The line would be unfastened before you actually set it down on the deck.

Q. Excuse me, I am not asking what happened to it. I am simply asking a simple question where it is customarily attached.

A. It is tied to the point of the tripod where it could be tied, generally.

Q. It has no particular location?

A. No, it has no particular location of insertion.

It would [599] be tied by the stevedores on the barge prior to the left from the barge.

Q. Using their own discretion where to tie it?

A. Provided they didn't tie it to something completely improper. They could tie it to the tripod without making trouble. If they do something wrong

(Testimony of Timothy William O'Brien.)

it is up to me or somebody representing the Air Force. It had to be tied to the points on the aircraft, or the—some point on the aircraft where it wouldn't damage anything.

Q. The main concern is to tie it where it wouldn't damage part of the plane?

A. There were two main concerns, one, to have the proper guidance of the tag lines. They had to be placed somewhere so that the aircraft could be guided while it is hanging and where it would not swing, or you had sufficient control and balance around it so that it wouldn't go swinging into something.

However, in that limitation, your second limitation was that it had to be tied somewhere on the aircraft that would not damage the assembly of the aircraft.

Mr. Cooper: I think that is all.

Mr. Resner: No questions, your Honor.

The Court: Step down.

The Witness: Thank you, your Honor.

(Witness excused.) [600]

Mr. Kay: We will call Mr. Stanley Davis.

STANLEY CHARLES DAVIS

called as a witness for the Respondent-Impleaded, sworn.

The Clerk: State your full name to the Court.

A. Stanley Charles Davis.

(Testimony of Stanley Charles Davis.)

Direct Examination

By Mr. Kay:

Q. Mr. Davis, what is your present occupation?

A. I at the present time am mining.

Q. Where?

A. In Nevada. Northeast corner of Washoe County.

Q. How long have you been doing that?

A. Since the latter part of October.

Q. Mr. Davis, you have been connected with safety work, haven't you, prior to that time?

A. Yes, sir.

Q. In what capacity and with what organizations and for what period of time?

A. As safety supervisor for the Maritime Association of the Pacific Coast from April 1, 1929, up until—my affiliation with them terminated the 15th of October, 1951.

Q. Then you went with that organization from about its inception, is that about right?

A. Yes, sir.

Q. Are you familiar with this booklet, Respondents' Exhibit A?

A. Yes, sir. That is the Pacific Coast Maritime Safety Code. [601]

Q. And are you familiar, Mr. Davis, with the operation of loading airplanes generally, including jet planes, onto the mechano deck of tankers?

A. Yes.

Q. Where a barge crane is used to put the plane

(Testimony of Stanley Charles Davis.)

over onto the mechano deck? A. Yes, sir.

Q. Can you tell us what a skeleton deck is?

A. A skeleton deck, there are two different types.

Mr. Harrison: If your Honor please, just for the record I object to the question on the ground no proper foundation has been laid. I don't know whether this man has ever been aboard a ship.

Mr. Kay: Very well, we will lay lots of foundation.

Q. Mr. Davis, how long have you engaged in this accident prevention work?

A. Since 1929 up to the middle of October, 1951.

Q. In the period of those years have you had occasion to go aboard vessels?

A. Yes, sir, hundreds of them.

Q. Have you been aboard vessels with mechano decks while they were loading aircraft on them?

A. Yes, sir.

Q. How many? A. Dozens of them. [602]

Q. Have you been aboard vessels in the old days before mechano decks were invented?

A. Yes, sir, I have been.

Q. Now, will you tell us what a skeleton deck is?

A. A skeleton deck is a temporary deck constructed in the holds of a ship. One type is for handling cargo which may be stowed in the wings or fore and aft of the hatch that the longshoremen cannot reach without a higher deck to go on.

Another type of deck is one that there was a temporary double deck for automobiles or machinery in the holds of ships.

(Testimony of Stanley Charles Davis.)

Q. This skeleton deck you have described, does it have movable beams like these (indicating) on a mechano deck? A. No, sir.

Q. This mechano deck, is that constructed of metals? A. It is.

Q. Are these skeleton decks you have described constructed of metal?

A. No, sir, they are constructed of lumber.

Q. Can you tell us whether an airplane attached to a line to be lowered on a mechano deck is a sling load? A. No, sir.

Q. With respect to these rules, Mr. Davis, I take it you are thoroughly familiar with them, is that right? A. Yes, sir.

Q. You were back there in 1929 when they formulated these [603] rules, is that right?

A. I was, sir.

Mr. Harrison: Your Honor please, I don't want to interpose a formal objection, but I might suggest Mr. Kay's questions have been very leading and suggestive.

Mr. Kay: Oh, that kind of question is so preliminary——

Q. (By Mr. Kay): I show you Pacific Coast Marine Safety Code dated November 6th, 1931. Are you familiar with that? A. Yes, sir.

Q. Will you state whether or not your name appears in that book?

A. Yes, sir, it does, under the heading of Board of Technical Advisers.

Q. In other words, here you are listed on the

(Testimony of Stanley Charles Davis.)

Board of Technical Advisers as follows: "Stanley C. Davis, Association's accident prevention department, San Francisco, California," is that right?

A. That is right, sir.

Mr. Kay: Your Honor, we would like to offer this in evidence.

The Court: It may be admitted and marked.

Mr. Harrison: What is it, Mr. Kay?

The Court: Identify it for the purpose of the record.

Mr. Kay: Pacific Coast Marine Safety Code dated November 6th, 1931. [604]

(Document referred to was thereupon admitted into evidence as Respondent's-Impleaded Jones Exhibit No. 1.)

Q. (By Mr. Kay): That book, Mr. Davis, does that contain rules that you have in this one of 1949, Respondents' Exhibit A? A. Yes, sir, it does.

Q. They are differently numbered, however, are they?

A. They are differently numbered, and the rules are put in various sections. That is the only difference.

Q. Will you tell us, Mr. Davis, whether there are situations encountered in loading and unloading a vessel that are not covered by the safety rules?

A. Yes, there are numerous situations.

Q. What situation—withdraw that. When these rules were promulgated—that is, from 1929 up to the present time—were the parties to the rules aware

(Testimony of Stanley Charles Davis.)

of the fact that there were situations that were not covered by the rules which were apt to develop in stevedoring situations? A. Yes, they were.

Q. Are there any rules that specifically cover the operation of loading jet planes onto mechano decks——

Mr. Harrison: I object to that, calling for an opinion and conclusion of the witness.

Mr. Kay: Can I finish the question?

Mr. Harrison: It is the Court's duty to determine whether or not these rules apply to this type of work. [605]

Mr. Kay: May I finish the question, your Honor, then objection might be made. I hadn't even finished the question.

The Court: Yes.

Mr. Resner: If your Honor please, might I have the statement of Mr. Harrison's read back?

The Court: Read it, Mr. Reporter.

(Objection read by the reporter.)

A. What rules?

Mr. Kay: I will try to finish the question, then we will see.

Q. Mr. Davis, in connection with these Pacific Coast Marine Rules, with which you are thoroughly familiar, you testified, is that right? A. Yes.

Q. I will ask you whether or not in those rules there are any that specifically cover the operation of loading a jet plane onto a mechano deck of a tanker? A. No there are not.

(Testimony of Stanley Charles Davis.)

Q. And I will ask you this: were rules 813, 820, 901 and 901 promulgated before mechano decks and jet planes were invented? A. They were.

Mr. Kay: I have no further questions.

Mr. Harrison: Do you want to aid your associate, Mr. Resner? [606]

Mr. Resner: I feel counsel's remark is unwarranted. I am here representing Mr. Luehr, nobody else.

Mr. Harrison: Pardon me.

Mr. Resner: Maybe you didn't have a good night's rest, Mr. Harrison.

The Court: This being Monday morning, you have to make a little allowance.

Mr. Harrison: Thank you, Judge.

Cross-Examination

By Mr. Harrison:

Q. Mr. Davis, Rule 901 of the 1949 edition of the Safety Code says, "Sling load shall not be put or suspended over men's heads." That is a very general rule. Do you think that rule is general enough to cover this situation of loading planes on mechano decks? A. No, I do not.

Q. In other words, you think it is perfectly all right to suspend sling loads over men's heads when loading planes on mechano decks?

A. If it becomes necessary for them to do so in the operation.

Q. But only when it becomes necessary, is that

(Testimony of Stanley Charles Davis.)

correct? A. When it becomes necessary.

Q. And only when it becomes necessary?

A. When it becomes necessary.

Q. Have you ever had anything to do with actually loading one [607] of these in a supervisory capacity? A. No, sir, I have not.

Q. Then you are not qualified to testify whether or not or when or if it becomes necessary, are you?

A. I believe I am.

Q. You said you never had anything to do with it. How do you qualify yourself?

A. In my capacity as a safety supervisor, it is our duty and was our duty to visit all vessels loading or dispatching cargo in this port.

Q. I see.

A. Especially those vessels who the stevedores doing the stevedoring work aboard them are members of the Association in which we service, and our particular duty was to investigate and study the various methods of operation in order to determine whether or not we could reorganize any safety precautions.

Q. Then you think you are qualified to testify—— A. I believe I am.

Q. ——the proper method of doing this operation? A. I believe I am.

Q. Let us assume the plane had gone over and arrived at a spot over the mechano deck, but the struts which are to be landed on the platform which is placed on top of the mechano deck have not yet

(Testimony of Stanley Charles Davis.)

arrived over the platform. Do you understand [608] my question? A. I understand.

Q. Perhaps I can demonstrate it better, your Honor, I have taken the liberty of investing ten cents of my own money in this. Would you step over to the model, please?

A. Yes, sir (going to model).

Mr. Harrison: I don't represent this as being to scale at all. I think I can demonstrate the question which I would like to ask.

Q. (By Mr. Harrison): The plane is being slung from the offshore side and is now over to the inshore side, and let's assume that it has passed the blocks and is too far inshore. Do you understand what I mean? A. I understand.

Q. And the landing gear, if the plane were lowered straight down, would miss the platform and the plane would land on its belly. Do you understand what I mean? A. I understand, yes.

Q. At that stage of the game is it necessary for the stevedores to grab hold of the struts or to go underneath the wings?

A. I take it—may I ask, your Honor, that this is the point at which it will be landed is five or six feet beyond where it eventually will be placed?

Q. Well, it has gone—well, let's see. It has come to a [609] point two or three feet away from the platform and directly over the platform.

A. May I answer that this way: When that plane is brought inboard by the crane, it is landed at as

(Testimony of Stanley Charles Davis.)

near the point where it will be permanently spotted as possible.

Q. You mean to say, it is suspended?

A. As near as possible. Then when it is near a point as near as possible, that is, placed by the crane as near as it possibly can, then it is necessary for the men to go underneath and grab that and hold it to keep it from swinging.

Q. It it true after they suspend the airplane, Mr. Davis, they frequently move the mechano deck beams and move the platforms so that it will be underneath the struts?

A. If the fore and aft beams are not in correct position, it is necessary for them to do that.

Q. They move the struts?

A. If necessary, yes, sir.

Q. After the platforms are where they decide to leave them, they swing the aircraft until the airplane is over the place, is that right?

A. That is right, and that is held and steadied and guided by the men themselves into place.

Q. Then after it is suspended so that it is over the platform, the only thing necessary to do at that time is steady it in place from swinging, is that [610] right? A. That is right.

Q. That is the only thing to be done?

A. Has to be steadied from swinging in order to keep it from striking any fixed object or any other plane which may have been lowered previously on the deck.

Q. When the plane gets in position over the plat-

(Testimony of Stanley Charles Davis.)

form, then the men go underneath and get it down to the platform, is that right?

A. That is correct.

Q. And then only, is that correct?

A. When it is at a point as close as the crane can spot it. The crane will spot it as close as he possibly can, and if necessary they will go under.

Q. If the crane operator had the plane suspended over the platform, it is still necessary for him to make an operation which would move the plane either inshore or offshore to get it over?

A. A distance of six or seven feet, yes, but a distance of two or three feet, no. That distance, two or three feet, the men can do themselves, grab the line and turn it to swing three or four feet.

Q. Well, if they are going to attach it, it is necessary to have the plane suspended directly over the platform, is it not?

A. Very probably. [611]

Q. You don't mean to tell me when they lower the plane, got to hold it?

A. They are holding it. They will steady it.

Q. After it is spotted over the platform?

A. Nearest position.

Q. I see. That is all. Will you take the stand again?

(Witness resumed the witness stand.) [612]

Q. You have described a skeleton deck for us, Mr. Davis. I don't believe Mr. Kay read Rule 813, because I am sure which he was referring to, which states this:

(Testimony of Stanley Charles Davis.)

> "When it is necessary to work a cargo on a skeleton deck, safe decking shall be provided unless the workmen can work safely from the cargo stowed below such skeleton deck."

What is the purpose of a rule requiring that there shall be decking over skeleton decks?

A. Well, the rule, decking—as I stated before, your Honor, the skeleton deck, as contained in that rule, consists of a skeleton deck constructed in the hold of the ship, in the opening of a hatch.

Q. I understand.

A. And that deck, if it is constructed there to remove cargo from the hold of the ship, then it is constructed by using hawsers or stacking up pallet boards where the men can easily remove the cargo from the hatches. All fore and aft of hatches until they get down to the level where they can lower from the deck——

Q. My question is, what is the purpose of the wording in the rule which says, "safe decking shall be provided on a skeleton deck"?

A. Safe decking, to give them a safe footing.

Q. To give them a safe footing? [613]

A. On a skeleton deck.

Q. What would you—how wide would you say the footing had to be for a safe footing?

A. I think the pallet boards use a four-foot board, and then they would stack them up across the hatch, and you would have a footing there with an opening between the boards and the pallets,

(Testimony of Stanley Charles Davis.)

which would range anywhere from two inches up to four inches.

Q. You mean two inches for a man to stand on?

A. No, four-inch board, and the board is four-foot square, you may have four turns of them across: if they are four feet, well, you have four tiers you would have sixteen feet by four feet footing.

Q. Then you would say a safe footing requires at least, about four foot square?

A. Yes, in a—the skeleton deck in the hold of a ship, four feet would be sufficient.

Q. And the purpose of requiring decking on a skeleton deck is to provide a safe footing, is that correct?

A. Not necessarily to provide only safe footing, but to get your men up high enough so he can handle the cargo out of the sling.

Q. In other words—withdraw that.

But the purpose of putting the decking or the mechano deck is to provide safe footing, is that correct? [614]

A. Wait a minute, you are talking about mechano decks?

Q. I mean, the skeleton deck, excuse me.

A. Yes, to provide a safe footing.

Q. You say a safe footing would be defined as something at least four feet wide, is that right?

A. Yes, four feet wide.

Q. You have testified that you would not term a plane suspended on a cargo fall a sling load?

(Testimony of Stanley Charles Davis.)

A. Yes, sir.

Q. Is that correct? What would you call the lines that they put underneath the wings of the plane to suspend it? A. You mean to steady them?

Q. No, to suspend the thing that the plane is actually attached to? A. Bridle.

Q. Bridle? A. Bridle.

Q. Would you call this a bridle load as distinguished from a sling load?

A. No, I would call it a lift, you have one that you lift, you ordinarily call it a lift in the stevedoring operation terms.

Q. A lift, I see. Now, Rule 911 says:

> "When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in [615] the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

Now, the term sling load is used there. Would you say that the same rule pertains to a lift?

A. Would you make that a little plainer so I can clarify myself in your question? You mean that that rule pertains to the lift when it is down to the point where it must be guided into position?

Q. Well, the point I am trying to make is this, Mr. Davis. The rule says, I will read only the per-

(Testimony of Stanley Charles Davis.)

tinent part of it, Mr. Kay, the rule which I feel pertinent:

> "When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object," and the load, I assume.

Now, would you say that that portion of the rule would apply equally well to a lift?

A. No, I wouldn't.

Q. Why not?

A. Because only lifts—it becomes necessary in various operations for the men to walk in and grasp that load in order to steer it and of course walk it into position where [616] it is going to be landed.

Q. Yes. Is it ever necessary for a man to walk—it says that, the remainder of the rule says:

> "Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

Now, is it your testimony that that rule does not apply to a lift?

A. That would apply to a lift or anything, because they would naturally stay out from under it until it came to shoulder height, and when it gets to shoulder height it becomes necessary for them to control the load.

Q. Now, isn't it true that the reason that they require it to come to shoulder height is so that the

(Testimony of Stanley Charles Davis.)

men can steady by putting their hands out directly in front of them? A. Yes.

Q. The rule requires them to come down to shoulder height so the men won't have to reach under there and consequently be under it (indicating)?

A. May I say that rule pertains generally to the handling of loads in a hatch, and when you are loading cargo and a load will come in, and then the longshoremen in a hold will take the cargo from the board or scow and stow it in the ship, and while they are doing that they may start to bring another load in, and that pertains to the fact that [617] they shall stand clear of that load, and there is a rule there that calls for them to hold that load until men in the hold are ready for it, and they can get in the clear and not be in the line of travel.

Q. I understand. And you say that the rule does not apply to deckloads at all?

A. Now, deckloads, you are giving that a lot of territory.

Q. You took in a lot of territory, you said the rule applied mainly to loading in the hold; does it apply to loading——

A. May I answer the question this way: That the men will stand clear until the whistleman has landed or spotted that load as near as possible over the point where he intends to land it permanently.

Q. I see.

A. Then it becomes necessary for the men to go under or near that lift.

(Testimony of Stanley Charles Davis.)

Q. In a general situation is—that the load, if the load is to be landed, or a plane landed on a deck—— A. Yes.

Q. There is no necessity for the men to go underneath that, they just come down and land the plane on the deck, is that right?

A. They have to steer it in position there too, because they will have the same thing if they are landing a plane on [618] the weather deck.

Q. But they steer it into position?

A. Into position if it is lowered to a point where they can get under it and walk it into the point where it would be landed.

Q. And when they steer loads into position they usually do it with their hands before them, pushing?

A. Not necessarily with their hands, they have to grasp it, because that plane might have to be pushed or pulled and you have to get a firm hold on it if they are going to secure it properly.

Q. When it is suspended from a cargo fall isn't it, it would take a very slight push?

A. That is the reason they have to have a sesure hold on it, not to push, but to hold it in case it would get away from them, to hold it back. And take a gust of wind, or the swinging of the ship, or even the boards which would cause it to head or boom could, because that plane, or that lift can swing in one way or the other, and in order to hold it securely they must have a secure grasp on the plane itself, on the strut or tripod or whatever object they can get a firm grasp on.

(Testimony of Stanley Charles Davis.)

Q. Have you ever seen them load jet planes?

A. Yes, sir.

Q. Do you know how wide the trailing edge of a jet plane [619] is?

A. No, that I do not. I have never paid any particular attention to the thickness, what it would be.

Q. Do you know whether or not it is so wide a man couldn't get a hold around it?

A. No, I don't think it is so wide he couldn't get his hands over the edge, that is, on the after end; the forward end, no, because the forward end is quite thick.

Q. The after edge there——

A. The aft edge is thinner, but just exactly how thin I wouldn't want to try to estimate.

Q. But to the best of your knowledge it is so thin that a man could grasp it with his hands, is that right?

A. He could grasp it, but he couldn't grasp enough to hold back on it, if he wanted to push, not to hold back, he couldn't grasp with what we would call a secure grasp.

Q. Well, the plane swings very freely, he could stop it from swaying, he could certainly hold onto it to keep it from swinging?

A. Not if he couldn't get a secure grasp, if he tried to hold on with the wing of the plane, didn't have a secure grasp why, it would just slide out from under his hand between his fingers.

Q. Do you know how wide a strongback is, Mr. Davis, generally speaking? [620]

(Testimony of Stanley Charles Davis.)

A. You mean the beam itself, the thickness?

Q. Yes.

A. The width, the—you mean the beams in the open hatch?

Q. Yes, the ones——

A. The hatch beams?

Q. The hatch beams?

A. They will vary from five to six and a half or seven inches.

Q. I see. Now Rule 820, Mr. Davis, provides:

> "Employees shall never ride strongbacks or beams; nor shall they unnecessarily walk on or climb upon those in place."

Is it safe to say that the reason they are not allowed to walk upon them is because they do not provide a safe footing? A. That's right.

Q. And you say between five and six inches wide?

A. That is right, they are spaced from four to five feet apart.

Q. Yes, and this rule in general would——

A. There are specifications in there, "When necessary," and there are any number of occasions when it is necessary to walk out on a beam.

Q. On a strongback?

A. To hook on the bridle, they hook on the bridle when removing or placing—— [621]

Q. Let me ask you this question, Mr. Davis. Let us assume that you were the gang boss of the stevedore gang loading cargo, or unloading cargo, and for some reason, which I cannot conceive of, but to con-

(Testimony of Stanley Charles Davis.)

form to your testimony, it became necessary to go out on a strongback to hold the bridle on. Could you give us such a situation?

A. Could I give you a situation? Yes, any number of them. The strongbacks are removed or placed by using what we call a strongback bridle at the end consisting of two wire lags, at the end, of what we call a toggle, a chain there at the end of the chain there is a cross bar. Those cross bars are inserted into holes in the sides of the beams, run through, and then pulled back so that the cross bar takes the weight of the beam. There are any number of instances where those holes in the beam are three or four feet out from the coaming that necessitates the man to get on the beam in order to either place or remove his strongback bridle.

Q. Would you say it was—you say you are very familiar with the safe practices in the safety code. Would you say it is a safe practice for a man to go out on a strongback to steady cargo as it came down?

A. They will not do that.

Q. They will not do that?

A. Because your strongbacks are removed before your cargo [622] is run into your hatch, and if it is necessary to load cargo into a deck or 'tween-deck, then the hatch covers are put on and you have a complete flooring.

Q. I see.

A. They never try to steady loads on a strongback.

(Testimony of Stanley Charles Davis.)

Q. They would not try to steady loads on a strongback? A. No, sir.

Q. A strongback is how wide? A. What?

Q. A strongback is how wide?

A. Run from five to seven inches.

Q. Do you know how wide those beams are?

A. Those beams on there are six inches, the fore and afts are six, I would say, six to seven inches, estimating the distance, and from what I have seen, and then your athwartship beams are your permanent beams, are around about ten inches.

Q. And those——

A. The fore and afts are your two beams in line with one another, gives you a little more space in the fore and aft than you would have on your athwartship.

Q. It is your testimony that a safe footing for the men would be at least four foot wide?

A. I said——

Mr. Kay: Just a moment. [623]

Q. (By Mr. Harrison): Is that correct, is that a correct interpretation of your testimony?

A. On a skeleton deck; I may add that in a skeleton deck you will have four feet.

Mr. Harrison: I think that is all.

Mr. Kay: I have no further questions.

Mr. Resner: No questions, your Honor.

Mr. Cooper: No questions.

(Witness excused.)

Mr. Kay: That is the impleaded respondent Jones Stevedoring Company's case, your Honor.

Mr. Cooper: If the Court please, there is no evidence in this case that requires putting on of any evidence by American Pacific Steamship.

Mr. Resner: We are willing at this time, your Honor, to dismiss, so far as the libelant is concerned, against American Pacific.

Mr. Cooper: If the Court please, if I understand counsel's statement, your Honor, I would say that the case having now been tried that we would ask that a judgment be entered in favor of the American Pacific Steamship Company and against the libelant and that we have an opportunity, of course, to present findings.

Mr. Resner: I don't think that is necessary if we dismiss it, your Honor, provides by a minute order the dismissal [624] be entered, they are out of the case. The only reason they were in here in the first place is because the contention by the Government that this was a dangerous place to work. As you know, I have taken the position, the Government having built the ship and having provided it would be responsible for any condition of that character. The evidence, of course, clearly shows the proximate cause and the reason for this accident to be the negligence of the Government's servants, and that being the case, and there being no showing by the United States here, and so far as unseaworthiness is concerned, the Government having seemed to abandon its position in that respect, we see no further reason to hold Mr. Cooper's client.

Mr. Cooper: If the Court please, there has never been any contention in this case by anybody, direct contention, that this mechano deck was unseaworthy and that Mr. Resner said at one time here in the case that the Government took that position, but the Government has never taken that position and neither has the impleaded Stevedore Jones taken that position. The result is there is nobody has taken the position that this mechano deck was unseaworthy, and we have denied it, so your Honor please, we insist on having a judgment which carries finding of fact. The effect in that, one of the things we will ask this Court to find that there is no evidence of unseaworthiness of the mechano deck of this [625] vessel, and that is why we are entitled to a judgment which carries findings of fact with it.

The Court: Submitted, gentlemen?

Mr. Resner: Yes, your Honor, submit it.

The Court: The only thing that is before the Court is the dismissal at this time. The motion will be granted.

Mr. Cooper: Still ask that we have findings of fact, your Honor. I ask that because there are other angles in this case which does not appear.

The Court: I can only determine what appears, I can't anticipate what the——

Mr. Cooper: I might say we are willing, if this makes any difference to counsel, we will waive costs as far as the libelants are concerned, that being the case.

Mr. Resner: That is not the point, Mr. Cooper.

The Court: Gentlemen, I have disposed of the motion; granted.

Mr. Resner: We have no rebuttal, your Honor; we rest. We are prepared to argue.

The Court: Proceed to argue, if you wish.

(Whereupon Mr. Resner presented argument to the Court.)

(Whereupon other counsel argued to the Court.)

[Endorsed]: Filed March 26, 1952. [626]

[Title of District Court and Cause.]

REPORTER'S PARTIAL TRANSCRIPT
April 10, 1952, at 2:00 P. M.

Mr. Resner: If your Honor please, we are at what I would call a hiatus.

The Court: I will level that out without difficulty.

Mr. Harrison: May I say something? When I left these gentlemen today we had agreed on findings. I had my girl type it as they found satisfactory. They agreed to them. I have them prepared.

The Court: Pass them along.

Mr. Harrison: They are submitted.

Mr. Resner: I don't agree with Mr. Harrison, Judge. May I be heard?

The Court: Certainly. First, tell me what findings you object to.

Mr. Resner: We go back to page 7, Judge, paragraphs 12 and 13. I object to the words, "which sum of money——"

The Court: Do you have his findings?

Mr. Harrison: Here are the ones we agreed to.

Mr. Resner: My objection is to the words, "is included as an item of damage."

If I may, Judge, I want to hand up the decree and findings we prepared for the libelant since we were the prevailing party. The difference between what Mr. Harrison has submitted and what I have submitted are the words, "and is [2*] included as an item of damage herein," and in paragraph 13 the last three lines.

I think that the Government is in a position where they can go into any court and assert any position they want to, and it is our position since we have submitted the findings, the burden will be upon us in the event of any appeal to support them. In other words, it seems to me that the danger that these findings may be in error that we, the libelant, have submitted is one of ours. And I assure your Honor that one, there is no desire on our part to prejudice the decree which your Honor has made; and, secondly, the Government still has the right to sue. What I don't want to have happen is for your Honor to determine or partially determine the issues which you say should be decided in another form.

The Court: I said that because when the mat-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ter was submitted, I repeat, I inquired whether or not a lump sum would be entered as a judgment. There was no protest.

Mr. Harrison: I beg your pardon, I protested strenuously.

The Court: Did he?

Mr. Resner: I don't recall that. He might have protested what ultimate decision your Honor reached, but how you did it——

Mr. Harrison (Interposing): I tried my best to outline in this case it would be necessary——

The Court: Maybe I am getting dull as the days go by, [3] but I don't think I am.

Mr. Harrison: I tried to outline loss of wages during the course of our argument, and all that. Your Honor told us it would be a lump sum, so of course I acquiesced.

Mr. Resner: I submit findings which are supported by the evidence. If there is anything wrong in that finding, the burden will be on us to assume. Secondly, we assure your Honor under the findings every right the Government has to sue is preserved, and my statement in the record to that effect seems to be adequate assurance.

The Court: Do you object to his finding No. 13?

Mr. Resner: Just the words in lines 19 and 20, Judge. After the word "date" I think there should be a period, after "date," and the rest of the sentence stricken, because I don't think your Honor has to decide that. Your Honor made a lump sum award. If you are going to say, for instance, "$7,300 is medical," your Honor could have said,

"so much for wage loss," too, and "so much for pain and suffering," and your Honor didn't do that. You said, "I will make a lump sum award." This leaves it where the evidence will have to be gone to to support the findings and the verdict.

The Court: With that stricken, how does that preclude you from asserting your right?

Mr. Harrison: May I suggest Mr. Resner might tell us the real reason he wants it stricken. [4]

Mr. Resner: I have no objection.

The Court: I invite frankness here.

Mr. Resner: I was completely honest with your Honor. The compensation people carried Mr. Luehr to the sum of $10,000. He has agreed to pay the $10,000 back. Let's assume the Government can prevail against the Firemen's Fund and make the Firemen's Fund pay back the $10,000, is Firemen's Fund then entitled to come back under the agreement with my client and get the $10,000 again? I don't want to subject my client to paying it twice.

The Court: That doesn't impress me. You will be able to take care of your client after I sign this judgment.

Mr. Resner: I don't think he should have to pay it twice. Secondly, I don't think, if your Honor please, under the finding of a lump sum award your Honor wants to break it down.

The Court: I don't.

Mr. Resner: We go to the evidence for that.

The Court: I don't, because I ordered a lump sum.

Mr. Resner: That's right.

The Court: Now, there are other issues entered into, that there is a finding, but I want to leave that in such a position that whoever wants to prevail or to assert their legal rights may do so.

Mr. Resner: That is in the findings between [5] the Government and Jones Stevedoring Company. They are submitting that in separate findings. That has nothing to do with the libelant in this case.

Mr. Harrison: Your Honor, Mr. Resner's only objection to those words, might submit his client to future suit by Firemen's Fund on some indemnity agreement that he has entered into with them, is entirely outside this lawsuit.

The Court: Yes.

Mr. Harrison: He just admitted if we prevail in our suit against Firemen's Fund, they then can turn around and sue his client, and consequently he wants that stricken. The reason is that so we won't prevail against Jones, so that Jones will not have the suit against his client. It is your Honor's duty to protect our rights.

The Court: I want to protect this client's rights, as well.

Mr. Harrison: However, an agreement entirely outside this case should not enter into it.

Mr. Resner: I agree, and I say the point he is raising is outside the issues, and what he says is not even pleaded by the pleadings.

The Court: Just a minute. I will straighten this matter out for you. "To date"——

Mr. Resner: "To date," period.

The Court: The other language is, "and that

said amount [6] is included as an item of damage herein." I didn't so conclude and I will strike that.

Mr. Harrison: Of course we will have to go along with that, your Honor, but it throws us out the window in our case against Jones.

The Court: Then out the window you go, brother.

Mr. Resner: And the same words, your Honor, in lines 5 and 6 after the word "carrier." Same page. And the words, "and is included as an item of damage herein" should be stricken.

The Court: So ordered.

Mr. Resner: Then the decree and the findings may be signed, your Honor? I think you have the findings there and the decree I have handed up to you.

Judge, may I direct your Honor's attention to what I think is an inadvertence: Lines 6 to 8. The last sentence is satisfactory. "It is true" to the word "right" we have agreed that is all right. Just the words should be stricken, "quote is included as an item of damage herein." The last sentence is satisfactory, your Honor. The last sentence of line 12, "It is true that libelant will be caused to incur expenses," and so forth. May I point that out to your Honor?

The Court: Yes.

Mr. Resner: (Indicating to the Court.)

The Court: I have that stricken. Since this is to be [7] appealed, you had better retype it.

Mr. Resner: We will substitute a typed page.

Mr. Kay: I have been following that, but that is going to the question of our findings, too, and I do

want to be heard on that, because I have gone into the record on that question of $12,000.

Mr. Resner: I have agreed to strike the $12,000.

Mr. Kay: Oh, yes, I apologize.

Mr. Resner: Mr. Kay, if you will let me, I will show you.

Mr. Kay: I apologize.

Mr. Resner: If we may withdraw it and have it retyped?

The Court: Go back to the Clerk's office and type it up. Next?

Mr. Kay: Your Honor, Mr. Harrison insists we made an agreement and now are withdrawing from it. We are because Mr. Harrison would not agree to Mr. Resner deleting from his findings this matter of $12,000 for medical.

Mr. Harrison: That is not true. I did agree to it. I typed the page and it is deleted.

Mr. Kay: Let me finish the argument.

The Court: If you gentlemen ever get me excited, all of you will cool off.

Mr. Kay: The point is, your Honor, that there were certain matters that tentatively I thought had been agreed [8] upon with respect to Mr. Resner's findings. Mr. Resner came back and said, "No." In that case we couldn't go along because on the proposed findings of the Government there is incorporated this provision:

"And this Court finds and incorporates herein, and makes a part hereof, the finding of fact made and found in respect to the amended libel of libelant

as herein as though the same were set forth in full herein."

Naturally, if we allowed the findings to go in on the basis of such proposed findings, we would be bound by it.

Mr. Harrison: Mr. Kay should see what is included in Mr. Resner's findings. We would not approve the $12,000——

The Court: That is out.

Mr. Harrison: It was put out on the page——

Mr. Kay: This item, "Included as an item of damage"——

Mr. Harrison: May I show you, Mr. Kay, Mr. Resner's handwriting where he wrote in——

Mr. Kay: I don't care about that.

Mr. Harrison: ——the $12,000 is out and I took it out.

Mr. Kay: That is one of the reasons. We have proposed and the findings again are substantially the same as the Government's, with the exception of the incorporation, and we have further incorporated the exact language of the Government in the proposed decree that we are asking your Honor to sign. [9] I want to read that.

The Court: The only difficulty I find myself in repeatedly, I am not as judicial as I should be or I wouldn't be listening to this thundering. That is the answer for trying to please everyone.

Mr. Kay: We have incorporated in our decree—and, after all, we take the same position Mr. Resner did with respect to the findings and conclusion and the decree. We say that is our responsibility, ac-

cording to law; and I have been practicing around here a long time, and I think we ought to be capable of judging what are proper findings.

We are proposing these findings ourselves now and taking full responsibility for them. In this decree, we have taken the language out of Mr. Harrison's proposed findings and conclusions of law:

"It is ordered, adjudged and decreed that respondent United States of America, a sovereign, take nothing from respondent-impleaded Jones Stevedoring Company on its petition to bring in third party under Rule 56, and that said petition to bring in third party under Rule 56 be and the same is hereby dismissed"——

And we have added, taken from the language of the Government's proposed findings,

"——reserving, however, the rights, if any, of the [10] United States of America to proceed against Jones Stevedoring Company for any amounts compensable under the Longshoremen's and Harbor Worker's Act, insurance policies herein referred to by reason of the waiver of subrogation agreement."

That is taken exactly out of their proposed findings and conclusions.

So that decree absolutely reserves any point they had to make, any effort to get something if they think they are entitled to it from Jones Stevedoring Company. He can't complain there.

We have the decree and have the findings based on the evidence. So, your Honor, we are going to submit our findings, our proposed findings and

conclusions of law, together with a final decree, copies of which have been served on the Government.

The Court: Where are yours?

Mr. Harrison: They are already in your hands, your Honor.

The Court: I will go over those and I will sign them so that you can go away and be assured that they will be signed.

Mr. Harrison: I apreciate the Court's courtesy in hearing it today and letting me get away.

The Court: That is why I exercised the patience I have. I will go into the findings and dispose of it. That is all.

[Endorsed]: Filed May 15, 1952. [11]

[Title of District Court and Cause.]

April 10th, 1952, 10:00 A.M.

The Clerk: Luehr vs. United States and Jones Stevedoring Company, settlement of findings.

Mr. Resner: Ready.

Mr. Harrison: Ready.

The Court: Proceed, gentlemen.

Mr. Harrison: I don't know exactly how your Honor would like to proceed. This is my motion for settlement of findings.

If the Court please, there are now four sets of findings before your Honor. Mr. Resner filed one

proposed set covering the case of Luehr vs. United States; Mr. Kay filed a set of findings covering the case of United States vs. Jones Stevedoring Company, and I have proposed counter-findings to both Mr. Resner and Mr. Kay.

Mr. Resner tells me the major point which I wish to change in his findings, he is agreeable to.

If your Honor please, it was my impression at the time of the trial that your Honor intended in his ruling to preserve to the United States the rights that we have that arise under the waiver of subrogation agreement. That matter was argued, and I think Mr. Kay asked for a decree in favor of Jones Stevedoring Company, and your Honor said that he would not make that, he would make a dismissal without prejudice to the right, our rights under the waiver of subrogation agreement. [2*]

As your Honor will recall, we argued during the course of the trial that the fact that the Jones Stevedoring Company has waived their right of subrogation with the United States enables us to recover from them the amounts payable by way of compensation to Mr. Luehr. I believe your Honor felt that that matter was not properly determinable here, and although I strenously argued that we could dispose of it and eliminate a further suit against Jones, I believe your Honor felt the best way to do it was to grant a lump sum award in this case and preserve whatever rights the United States had against Jones on the waiver.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

I am not talking about the indemnity agreement with Jones Stevedoring Company. The "whole or in part," I am not talking about negligence at all. As I understand it, we lost on that point, and the findings which I have proposed would give us a definite order on that point that Jones was not guilty of contributory negligence and we were not entitled to indemnity under the contract. However, the findings which I have proposed would preserve to the United States their right to sue Jones for compensation payment.

Now, I believe that, perhaps inadvertently, the findings which Mr. Resner proposed would destroy that right insofar as the medical payments are concerned, and I believe Mr. Resner is now willing to concede his findings in that respect is in [3] error.

Mr. Resner: Mr. Harrison, maybe we can dispose of this. If your Honor will turn to page 7 of Mr. Harrison's findings, line 12.

Mr. Harrison: I have two sets. Let's get the right one.

Mr. Resner: Perhaps I could assist your Honor in pointing to the one directly, because there are four sets and it is a little confusing. Would you care to have me do that?

The Court: Surely.

Mr. Harrison: I proposed counter-findings to both Mr. Resner's findings and Mr. Kay's findings, so there are two sets.

The Court: What is the number of the finding you wish to direct my attention to? Finding No. 7?

Mr. Resner: Yes, your Honor. Those are the findings Mr. Harrison proposes in the case in chief, your Honor, in the case of Mr. Luehr against the Government. Would your Honor look at line 3 to 6:

"It is true that libelant has incurred medical expenses on account of said injuries to the date hereof in the amount of $7,322.32, which has been paid by his employer's compensation insurance carrier, and that said amount is included as an item of damage herein." [4]

I want to put a period after the word "carrier," and strike out "and is included as an item of damage herein,"

Throughout these findings as I was preparing them I was trying to bear in mind your Honor's statement that you wanted to make a lump sum award. All the evidence is in the record before the Court, and your Honor felt that you didn't want to break down the award item by item, so I feel the findings should reflect that attitude on your Honor's part.

The Court: The only discussion on that was, I inquired whether you wanted the Court to make a lump sum award.

Mr. Resner: Yes, and we agreed you should.

The Court: There was no further discussion on it.

Mrs. Resner: You are absolutely right, Judge. One, after the word "carrier" there should be a period and the words Mr. Harrison proposes, "and is included as an item of damage herein" should be stricken.

Then in paragraph 13, which is the next paragraph, your Honor, lines 19 to 22.

"It is true that he could have earned——"

the libelant,——

"approximately the sum of $7500 during the period from his injury to date, and that compensation has been paid by libelant's employer"——

He means libelant's employment compensation case——

"in the amount of $3,082.20 to date." [5]

I would want to strike out what Mr. Harrison says. It is my feeling what is damage and what isn't damage is in the record, and you have made a lump sum award, and I don't think at this time we should be breaking this down. You made a general finding, and therefore the findings in this regard should be general.

Mr. Harrison: If your Honor please, let me point out that Mr. Resner's original proposed findings set out $7,322.32 has been paid by his employer's compensation insurance carrier, and he put in there, "which is not entitled to recoup same, and which sum of money is not an item of damage herein." So I don't think Mr. Resner's comment about a lump sum——

Mr. Resner: Yes, we have that, Mr. Harrison. On reflection and thinking what the Judge said, I feel I made a mistake in that proposal, and I am saying I am in error and I am telling his Honor I feel the findings should conform to the statement

we agreed upon concerning the general award, and that would cause a few words to be stricken in paragraphs 12 and 13.

Mr. Harrison: If your Honor please, I don't see how it could possibly hurt Mr. Resner to have it say it is included as an item of damage, and it will clarify the case that the United States may have against the compensation carrier, because the only thing we are entitled to recover from them [6] are damages that have been recovered from us specifically. Therefore, the finding that this $7,322. is an item of damage, specifically covered and specifically recovered against us, would give us the right to collect that specifically against Jones Stevedoring Company. I believe this would clarify the matter, simplifying any further litigation against Jones Stevedoring Company or their compensation carrier. It might even let us go in on a stipulation of facts.

The Court: What is your showing?

Mr. Kay: Your Honor, please, the findings that have been proposed by the Government, with just a few exceptions that we can point out shortly, are going to be agreeable to us and, with the exception of the exceptions discussed by Mr. Harrison and Mr. Resner, to the libelant. The Government's rights will be preserved, in any event, on this question of the subrogation right to the extent of whatever the carrier in this case had to pay up to the time that the notice of election to sue was filed.

Mr. Harrison: Just a second, Mr. Kay. It was

never filed in this case. That is exactly what I want to clarify.

Mr. Kay: Then up to the time the suit was filed. The minute libelant sued the third party, there was no longer any obligation on the part of the carrier to pay any further compensation. [7]

Up to that point what the Government is seeking in the way of recovering moneys paid that the carrier was liable to pay under the Longshoremen's Act, that is a matter of record. We should have no trouble stipulating to it. The Court wanted their rights to be preserved. Without regard to any findings other than what Mr. Harrison has proposed in these findings as to the impleaded petitioner, I think I can point out to your Honor on page 6—this was the findings proposed as to the impleaded petitioner, your Honor. The Government has proposed this finding, with which we are completely in accord, and which will preserve its rights. That is finding No. 11:

"The issue of whether or not Jones Stevedoring Company and/or Firemen's Fund Insurance Company must reimburse the United States for such portion of the liability herein occasioned by cost of medical attention past and future, although argued and presented, is not properly determinable in this action." Then the following proposed findings:

"That the issue of whether or not Jones Stevedoring Company and/or Firemen's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the pro-

visions of the Longshoremen's and Harbor Workers' Act and [8] the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action."

We agree with those findings.

As to findings of "included," that leaves the Government with the reservation that your Honor had in mind in proceeding on any cause of action they feel they have against Firemen's Fund Insurance Company or Jones Stevedoring Company.

The Court: That will give everyone their day in Court.

Mr. Kay: That is correct, your Honor.

The Court: I agree with that.

Mr. Harrison: Those are the findings I have proposed, your Honor.

The Court: With some minor amendments.

Mr. Kay: If I may follow through on that, following those two findings Mr. Harrison has proposed the following. This is No. 13, page 7, on that same point we are referring to,—that is, on this impleaded petition. It reads as follows:

"That the amount of award herein attributable to cost of hospitalization amounts to $7,322.32 covering cost to date, and $12,000 covering cost of future expected medical expense."

We say that finding is improper and could not be made a finding in this proceeding for this reason: First, as I have indicated, their rights are preserved by the proposed [9] findings made before that. This question of how much the medical cost is, and how much future cost there is going to be, is immaterial

in reserving their rights because whatever they were at that time—incidentally, this $7,322.32 does not represent the amount that was payable before suit was filed. This was the amount paid to them. That question of how much they got goes in a suit against the Jones Stevedoring Company and Firemen's Fund.

Also, this question of $12,000 covering cost of future medical expense wouldn't be part of these proceedings at all, because the only thing they could possibly recover on their theory would be the amount of compensation and medical expenses paid to the time this libelant elected to sue a third party, namely, the Government.

Mr. Harrison. That is not our theory, your Honor. It is our theory we can recover all the amount payable, and that is the right I am seeking to preserve.

Mr. Kay: There is certainly a difference of opinion, then.

And the next, Article 14 is immaterial, we say, because under Title 33 the law provides in the event an injured workman is permanently partially disabled his maximum recovery may be $11,000. That has nothing to do with the right of the Government to recover anything under that insurance clause. That is just a statement of the law. But the other provision, [10] Article 13, referred to $12,000 for the costs. That is no part of their right to recover under their subrogation clause. So we say those two provisions should be deleted.

As to the rest of the proposed findings, we are

entirely in accord with the Government with the exception of one on page 8 which Mr. Harrison has agreed to. It merely clarifies the last conclusion, namely, Article 5, with reference to the provision in which it refers to the "Right to proceed against Jones Stevedoring Company for such amounts found to be compensable." That is line 20.

Mr. Harrison is agreeable to that.

Mr. Harrison: I realize what it will do to us, but may I say this: The findings which I have proposed do not prejudice Mr. Kay or Jones Stevedoring Company in any way should they prevail on their theory. If we should prevail on our theory, the deletions which Mr. Kay has suggested do seriously prejudice our theory of the matter.

I think all the findings I have proposed were properly introduced in evidence here. They were all matters discussed. The matter of future hospitalization was one of the items placed on the board here, and I assume your Honor went along with it. There was no evidence to the contrary.

All the items which I have proposed—I assure your Honor I am not trying to mislead the Court in any way. I am merely trying to protect our rights under our theory. [11]

May I say this: When I argued our theory of the case Mr. Resner complimented me frequently by saying I should return to law school. Two days after the trial was over the District Court in Pennsylvania—Circuit Court in Pennsylvania went along with the suggestions which I was making to your Honor and reduced the award against the United

States by the amounts of the compensation paid. As I understand your Honor's ruling, in this case you were not willing to do this at this time. I would like that, if possible, we could still dispose of this possible litigation against Jones Stevedoring Company by reducing the $125,000 by the amounts we feel we can recover against Jones. That is exactly what the Circuit Court of Pennsylvania did in Ballardi vs. United States, which appears in the new 1952 A.M.C.

The Court: That is a phase of the case I was in doubt about.

Mr. Kay: While he was looking at that, that case involved and there was a finding of joint negligence, and the Court had in mind that in that case it would be fair and equitable to so find.

Mr. Harrison: If your Honor please, joint negligence is an entirely different matter. This case, in the findings in damages, they are credited to the findings against the United States the amounts payable by way of compensation.

The Court: Let me give you my thought on this matter. [12] I want to sustain a judgment against the Government in relation to this $125,000.

Mr. Harrison: The findings which I have proposed do that, your Honor.

The Court: Now then, the other issue between you and the carrier, I am willing to give you the opportunity of having your day in court on that. Now, get together and prepare findings accordingly. That is my present state of mind and has been my state of mind all during this case. I want to give

everybody an opportunity to have their day in court.

Mr. Resner: That is the big problem. We both feel the findings we have proposed do that. What it amounts to, I suppose, is that we are jockeying, for what we conceive to be legal positions.

The Court: If everyone is acting in good faith, they will have their day in court.

Mr. Resner: That is true.

Mr. Harrison: May I say this: The findings I have proposed would enable us to proceed on our theory. If Mr. Kay prevailed on his theory, the findings would not prejudice him one bit. I think Mr. Kay, if he is so confident of his theory, could agree these are all right. They do not prejudice you.

Mr. Kay: In very simple language we can substitute for the findings I object to here sufficient language to completely [13] and without any question reserve to the Government its right to proceed on the theory that it has some recovery under, or some cause of action under the subrogation.

The Court: You haven't persuaded him.

Mr. Kay: Apparently I haven't here.

Mr. Harrison: That isn't the point. Admittedly we have a right, but only under Mr. Kay's theory, and we have another theory and he is trying to eliminate that.

The Court: I will say frankly you both may have your theory of the case and I don't want to interfere with it.

Mr. Kay: My suggestion will give them complete freedom to urge any theory.

Mr. Harrison: That is not our theory.

Mr. Kay: It will for this reason—I will try to be brief—when they propose a finding here that a certain amount has been recovered for future medical expenses, and that under the Longshoremen's Act it is provided that there is a maximum of $11,000 recoverable by the injured employee for permanent partial disability, those are facts that cannot be altered by any situation. First of all, the law is the law. I say that that particular provision is immaterial here. If it has to be in to satisfy Mr. Harrison, I will be frank to say I don't think it can do us any harm. It just hasn't any place in the findings.

The Court: If it doesn't do you any harm, I am prepared [14] to sign it.

Mr. Kay: Very well. That is No. 14. As to No. 13, your Honor, this refers to the amount attributable to the hospitalization and future expected medical expense. This would represent a finding on a certain issue. As to the $12,000 for the medical expenses, there has been no finding on that. There has been no evidence, really, as to any such finding, and I think that would be improper.

Mr. Harrison: Would that do you any harm, Mr. Kay?

Mr. Kay: Because it is improperly in here, yes, as an opinion of the Court wouldn't ever justify a finding that isn't properly in the case.

Mr. Harrison: It would merely mean we would have to try the case on damages again.

Mr. Kay: I assure you that isn't so. If they file a complaint against the Firemen's Fund Insurance Company, they are going to allege a certain amount of hospital and medical expense and compensation has been paid by the Firemen's Fund.

Mr. Harrison: Is payable by Firemen's Fund.

Mr. Kay: That is still a matter they could allege and prove.

Mr. Resner: There wasn't evidence on that question.

Mr. Kay: They put a statement on the board, your Honor.

Mr. Resner: What Mr. Harrison is confusing is this: Once Mr. Luehr decided to go against the third party, all his [15] testimony became wrapped up in the lawsuit which your Honor heard, and future medical and future compensation were substituted as against the Firemen's Fund and the United States became liable for it.

Mr. Harrison's theory is that under their anti-subrogation agreement they can get back the maximum they might have to pay had Mr. Luehr not sued, but that is not the theory of the third party. If Mr. Harrison can prevail on that theory, it seems to me all he has to do is file a complaint against that Firemen's Fund and plead it.

Mr. Harrison: The findings I have proposed won't do them any harm.

Mr. Kay: It just isn't proper. I can think of findings that wouldn't harm Mr. Harrison, but it isn't proper. That contract is between an entirely different party. Firemen's Fund Insurance Com-

pany made a contract with the Government that under certain conditions Firemen's Fund couldn't subrogate against the Government. Whether or not a payment of compensation here and any recovery back of that is indirectly violating that agreement is a matter for another suit against the Government and Firemen's Fund.

Again, the $12,000 alleged herein as future medical was never found herein. There is no evidence on that.

Mr. Resner: Oh, there is evidence.

Mr. Kay: We would be entitled to litigate that part if [16] they have a right to recover for future medical, which I say they don't have.

Mr. Harrison: They had the opportunity to litigate it here, and that is exactly what Mr. Kay overlooked.

Mr. Kay: At no time have we avoided that issue. We are willing to submit it, your Honor.

Mr. Resner: I think your Honor understands the problem. I think we should submit it.

The Court: I want to dispose of it. Counsel wants to get away.

Mr. Resner: As far as the findings, the litigant's concern is simple. I just want to strike from paragraph 12, page 7, "And is included as an item of damage herein." That leaves a finding that this money was paid by the carrier. If they are entitled to get it back, that is their lookout.

Then I want stricken from line 22, "Said amount is included as an item of damage herein," and leave that that $7,322.32 was paid. If the Government has

a right to get it back, all they have to do is assert it in another lawsut. Your Honor made a lump sum award, without specifying just what was a particular item of damage, leaving the evidence to support the particular finding.

Mr. Harrison: May I say there was no intention not to include these as items of damage. [17]

Mr. Resner: That is right. There is no question——

Mr. Harrison: Then there is no reason it shouldn't be in the findings.

Mr. Resner: Only that his Honor made a general decree.

Mr. Kay: Your Honor, I think this should solve this problem insofar as Mr. Harrison is concerned, and I think in connection with Mr. Resner's findings. We will now further agree to this finding to be substituted at page 7, Article 12, to which I objected to the whole article. I would be willing now, if this will facilitate this situation so we can get these findings signed, to agree in the findings that the amount of $7,322.32 had been paid by the compensation carrier, and eliminate this question of $12,000 for future medical.

Now, if they have a suit here and they can show any future medical that has to be paid, I don't see the point because the carrier is no longer liable to pay any future medical. This recovery of $125,000 eliminates any future liability for medical, so there is no necessity to have it in here.

The Court: Prepare your findings accordingly.

Everybody will have their day in court. Do that this morning. Retire and do it.

Mr. Harrison: I don't think we are going to be able to reach an agreement on this, because that would blast the [18] Government's theory. My findings preserve our rights to the minimum. It doesn't impose or impinge upon any right of Jones Stevedoring Company. The only thing I can do is submit the findings I have.

The Court: What I am trying to do is dispose of the matter at hand. I made a finding in respect to your client——

Mr. Resner: Yes, Judge.

The Court: ——for $125,000. Now this other situation has arisen, and I think it was generally known, discussed superficially. I want you to have your day in court in relation to that. That is all.

Mr. Harrison: I submit our findings would not harm anybody else at all. If they prevailed on their theory——

Mr. Kay: Just a final word: What Mr. Harrison is trying to do is get a finding that would bind Firemen's Fund in a suit against them. They were not a——

Mr. Harrison: That is not true. Our theory is Jones Stevedoring Company is liable for this just as much as the Firemen's Fund Insurance Company. Maybe Mr. Kay doesn't agree.

The Court: All right, you are still going to sue Firemen's Fund?

Mr. Harrison: We are going to sue both of them.

Mr. Kay: All right, Firemen's Fund will be a

party. He is trying to get a finding he would try to use against [19] Firemen's Fund. He would have to establish that whatever the facts are here as found in these findings are in accordance with the evidence. We have agreed with everything that is proposed as findings with the exception of this $12,000 item which is not properly there.

Mr. Resner: And the $11,000 future.

Mr. Kay: Yes. I don't care about that. That is a statement of law. We will agree the law says an injured longshoreman may recover $11,000 if there is no third party suit. That is clear. We have agreed to everything they have proposed, except this one item which is not properly a finding.

The Court: Eliminate it, gentlemen. Eliminate it.

Mr. Resner: All right. Then these findings I have been talking about, Mr. Harrison, are acceptable. I will write them any way your Honor wants to.

Mr. Harrison: Just a minute. I didn't consent to any change in the findings.

Mr. Resner: I am telling the Judge if he wants to leave in the words, "And included as an item of damage herein," if he wants them in, we will leave them in. That is what it comes down to, whether it should leave in the words, "Is included as an item of damage herein."

Mr. Kay: If I understood his Honor, he said to eliminate that. Am I correct?

The Court: If that doesn't preclude the issue being [20] tried.

Mr. Kay: It does not, your Honor.

Mr. Harrison: It does. It definitely does. If it doesn't say that is included as an item of damage herein, we have no suit.

The Court: I can't follow you.

Mr. Harrison: In that $125,000 I am sure your Honor intended to include all the medical expenses, both past and future.

The Court: I am not prepared to say that.

Mr. Harrison: The $125,000, then, is over and above——

The Court: Not necessarily. I tried to indicate to you—this matter was discussed and I made an inquiry, "Do you want a lump sum judgment in this case"? And that was limited to the client. This other controversy that raised up, that will have to be litigated.

Mr. Harrison: I agree, but we are discussing a finding in Mr. Luehr's case, and the $125,000 includes all Mr. Luehr's items of damages, does it not? There is nothing more coming?

Mr. Resner: We don't say that. All we say is the judge made a general award and preserved to you, Mr. Harrison, your right to litigate out any right you may have to recover. Isn't that correct? That is what the judge said. He said he would make a lump sum award and preserve to you without [21] prejudice.

Mr. Harrison: This is pure fakiness, trying to avoid the effects of the Baraty case which I just cited.

The Court: I am glad we are getting along so well.

Mr. Harrison: This particular collaboration between the parties has been going on through the entire trial, and they are attempting to perpetuate what they have worked out between themselves.

The Court: I want to pay you a compliment on your interest in behalf of the Government. I will not discourage it. That is the reason I left this issue so that you might, no matter who may prevail, have an opportunity to have your day in court, and that is the only interest I have.

Mr. Harrison: That is exactly what I am trying to preserve. I submit the findings I proposed and Mr. Resner's are the only way we can preserve it.

The Court: I have a case on trial now, gentlemen. I am not going to give you any more time.

Mr. Kay: If we may take the findings that have been filed with your Honor, perhaps we can put them in a shape that your Honor will sign them this morning.

Mr. Harrison: I am afraid I am not going to make any concessions. I have prepared the best findings I can.

The Court: That is all right. I don't want you to make any concessions. But I am prepared to sign the amended [22] findings along the line I have indicated.

Mr. Kay: Would your Honor prefer we come in this afternoon and present them?

The Court: I will be here all day.

Mr. Kay: Would two o'clock be all right?
The Court: Two o'clock.

(Thereupon an adjournment was taken until two o'clock p.m. this date.)

[Endorsed]: Filed May 15, 1952. [23]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court or true copies of orders entered in the above-entitled case and that they constitute the record on appeal herein, designated by the parties thereto:

Answer.

Petition to Bring in Third Party Under Rule 56.

Answer to Petition and Libel.

Minute ord. of Dec. 4, 1951, denying motion for continuance of trial date.

Minute order of Dec. 7, 1951, denying exceptions of Jones Stevedoring Co. to Petition and Libel.

Motion to Add American Pacific Steamship Co. as Party Respondent.

Order Adding American Pacific Steamship Co. as Party Respondent.

Amended Libel in Personam for Damages.

Minutes of Trial—March 17, 1952.

Minutes of Trial and order denying libelant's motion to dismiss as to American Pacific Steamship Co., without prejudice—March 18.

Minutes of Trial—March 19, 1952.

Minutes of Trial—March 20, 1952.

Minutes of Trial—March 21, 1952.

Minutes of Trial and order granting libelant's motion to dismiss as to American Pacific Steamship Co.—March 24, 1952.

Minutes of Trial, including dismissal as to Jones Stevedoring Co. and judgment for libelant.

Findings of Fact and Conclusions of Law submitted on behalf of libelant.

Minute order settling findings of fact and conclusions of law—April 10, 1952.

Findings of Fact and Conclusions of Law as submitted by Jones Stevedoring Co., Respondent-Impleaded.

Findings of Fact and Conclusions of Law.

Final Decree (Jones Stevedoring Co.).

Final Decree (Libelant).

Notice of Appeal.

Order Allowing Appeal.

Citation on Appeal.

Order Extending Time to Docket.

Assignment of Errors.

Respondent United States of America's Designation of Apostles on Appeal and Praecipe Therefor.

Libelant's Additional Designation of Apostles on Appeal and Praecipe Therefor.

Six Vols. Reporter's Transcript.
Deposition of Cecil Bailey.
Deposition of Charles Cates.
Libelant's exhibits Nos. 1 to 39.
Respondents' exhibits A, B, C, D & E.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court at San Francisco, California, this 30th day of September, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 13,562. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank Luehr and Jones Stevedoring Co., a Corporation, Appellees. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 30, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals, for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13,562

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR,

Appellee,

and

JONES SSTEVEDORING COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED ON ON APPEAL AND DESIGNATION OF PORTION OF RECORD TO BE PRINTED

Appellant adopts as points on appeal the Assignment of Errors included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal as designated by the appellant on file herein except that by stipulation on file herein the exhibits with the exception of Government's Exhibit (C) and Government's Exhibit (D) need not be printed and may be considered by the Court in their original form.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,

/s/ J. STEWART HARRISON,
Attorney, Dept. of Justice,
Proctors for Appellant.

[Endorsed]: Filed October 16, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between appellant and both appellees, acting by and through their respective proctors, that in order to save further cost of printing, all exhibits heretofore admitted in evidence herein, except appellant United States of America's Exhibits (C) and (D), need not be printed, and that the same may be considered in their original form.

It is further stipulated and agreed that appellant United States of America's Exhibit (A) being the Pacific Coast Marine Safety Code which is in booklet form, need not be printed, but that additional copies of said booklet will be furnished the Court by appellant.

And it is further stipulated that appellant's Exhibit (B) being a contract between appellant and appellee, Jones Stevedoring Company, need not be printed and that the pertinent portion thereof appearing in the appellant's Petition to Implead a

Third Party, and Jones Stevedoring Company's Answer to Said Petition are true and correct excerpt from said Exhibit (B) and may be considered by the Court as excerpts therefrom in order to avoid duplication of printing.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,

/s/ J. STEWART HARRISON,
Attorney, Dept. of Justice,

Proctors for Appellant, United States of America.

JOHN BLACK, and

EDWARD R. KAY,

/s/ JOHN H. BLACK,

By /s/ EDWARD R. KAY,

Proctors for Appellee, Jones Stevedoring Company.

HERBERT RESNER, and

RAOUL D. MAGANA,

By /s/ HERBERT RESNER and

/s/ RAOUL D. MAGANA,

Proctors for Appellee, Frank Luehr.

So ordered:

/s/ WILLIAM DENMAN,
Judge, U. S. Court of Appeals.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed October 17, 1952.

No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

This is an appeal in admiralty from the final decree (R. 72) made and entered herein by the United States District Court for the Northern District of California, Southern Division, on April 11, 1952, in favor of appellee Frank Luehr, and from the final decree (R. 70) made and entered herein on April 11th dismissing appellee Jones Stevedoring Company from liability under the petition of the United States impleading said appellee under Rule 56. Said petition sought recovery-over of any amounts for which the United States was found liable on the amended

libel (R. 3) brought against the United States under the Public Vessels' Act, 1925 (46 U.S.C. 781 et seq.) by an injured longshoreman to recover damages in consequence of a personal injury on board the USNS SHAWNEE TRAIL.

The amended libel was also directed against the American Pacific Steamship Company, a corporation. During the course of the trial proceedings, the respondent American Pacific Steamship Company was dismissed by the District Court (R. 38) and no appeal is taken from that order of dismissal and said respondent American Pacific Steamship Company is not a party to this appeal.

Notice of appeal was filed July 8, 1952 (R. 73) and the appeal was allowed July 14, 1952 (R. 74). The jurisdiction of the Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (as revised, 28 U.S.C. 1291).

STATEMENT OF THE CASE.

Shortly before noon on July 28, 1950, Frank W. Luehr, a longshoreman employed by the Jones Stevedoring Company, was injured while working on board the USNS SHAWNEE TRAIL, which was docked at Naval In-Transit Dock No. 3, Alameda, California. At the time of the accident, the Jones Stevedoring Company was loading a deck cargo of airplanes on the mechano deck of the SHAWNEE TRAIL. This

stevedoring operation was being carried on by the Jones Stevedoring Company under the terms of a stevedoring contract with the Federal Government, designated as DA 04-197 TC-246. (Govt. Exhibit "B".) The airplanes were being lifted from a barge alongside the SHAWNEE TRAIL and lowered to the mechano deck of the SHAWNEE TRAIL by an Army derrick barge.

At the time of the injury, one of the airplanes had been lowered to within a few feet of the mechano deck of the SHAWNEE TRAIL, and Luehr was standing on the mechano deck partially under the suspended airplane. At this point the crane operator aboard the derrick barge inadvertently released the friction gear and the plane dropped suddenly, thereby striking Mr. Luehr and throwing him from the mechano deck of the tanker to the main deck some seven feet below. The crane operator aboard the derrick barge was a United States Army Civil Service employee. The stevedores aboard the USNS SHAWNEE TRAIL were all employees of the Jones Stevedoring Company and were directly under the supervision of a foreman employed by Jones. The airplanes were being located on the vessel in accordance with the previously made up cargo plan provided by the United States Army Air Force.

The contract between the Federal Government and the Jones Stevedoring Company, under which this loading operation was being performed, provides in part as follows:

"Article 14. *Liability and Insurance.*

(a) The Contractor

(1) shall be liable to the Government for any and all loss of or damage to cargo, vessels, piers or any other property of every kind and description, and

(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for cargo, vessels, piers or any other property of every kind and description, whether or not owned by the Government, or bodily injury to or death of persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

(b) The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to property or bodily injury to or death of persons.

(1) If the unseaworthiness of the vessel or failure or defect of the gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such damage, injury, or death, and the Contractor, its officers, agents and employees by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment, or through the exercise of due dili-

gence could not otherwise have avoided such damage, injury, or death.

(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees of the Contractor with specific direction of the Contracting Officer."

After the accident, Mr. Luehr was hospitalized, and at the time of the trial in the District Court had received compensation under the Longshoremen's and Harbor Workers' Act in the sum of $3,082.20, and in addition had received medical attention costing approximately $7,322.32. The Contract between Jones Stevedoring Company and the Federal Government further provides, at Section 14(c):

"The contractor shall, at his own expense, procure and maintain, during the terms of this contract, insurance as follows :

(1) Standard Workmen's Compensation and Employers' Liability Insurance and Workmen's and Harbor Workers' Compensation Insurance, or such of these as may be proper under applicable state or Federal statutes.

(2) Bodily injury liability insurance in an amount of not less than $50,000.00 any one person and $250,000.00 any one accident or occurrence."

Jones Stevedoring Company obtained such insurance, and on each of the policies was an endorsement reading as follows:

> "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the Company waives all rights of subrogation against the United States of America that it might have by reason of payment under this policy."

At the conclusion of the trial in the District Court, the District Judge awarded to the libelant the sum of $125,000.00, with interest and costs, against the United States, without indemnity-over from the Jones Stevedoring Company under the terms of the contract.

QUESTIONS PRESENTED.

The first question presented here is whether or not the presence of the injured stevedore (an employee of Jones) under the suspended load, which was subsequently negligently dropped by a United States employee, involved negligence of an employee of Jones so as to make the company liable-over to the United States for the amount of such judgment under the terms of the contract whereby the contractor has agreed to be wholly liable for any personal injury occasioned "in whole, or in part by the negligence or fault of the contractor, his officers, agents or employees in the performance of work under this contract". The contract further provides: "The general liability and responsibility of the contractor under this clause are subject only to the following specific limitations." The only specific limitation pertinent

here reads as follows: "(b)(2) If the damage, injury or death resulted solely from an act or omission of the Government or its employees * * *" So, conversely, the question can be stated: In view of the proven fact that the injured man placed himself in a position of danger under a suspended load, and that he was not warned to remove himself therefrom by the Stevedore foreman at the time the foreman knew and had ordered the load to be moved, have the Stevedore so excused themselves from negligence as to escape their general liability under the contract by proving that the accident falls within the terms of the contract exceptions in that it was caused solely by the negligence of an employee of the Government?

The second question presented is whether or not the judgment should be reduced by the amount of compensation and medical expenses paid by the insurer of the employer Jones, in view of the express waiver of subrogation against the United States.

The third question presented is whether or not the award of $125,000.00 is excessive to a stevedore 53 years old at time of trial, who averaged approximately $3,400 yearly wage immediately prior to injury, had permanent disability but probably not total disability, loss of wages at time of trial of $3,700, and hospital expenses of $7,322.32, especially when evidence shows the award necessarily includes $85,000 to $90,000 general damages.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In holding that the injuries to the libelant were caused solely by the exclusive negligence of the respondent United States of America.

2. In holding that the injuries to the libelant were not caused in whole or in part, or at all by the negligence of Jones Stevedoring Company, its officers, agents or employees.

3. In holding that the Jones Stevedoring Company is not obligated to respond to the United States by way of indemnity under the terms of their contract with the Government.

4. In failing to credit to the award of $125,000.00 the amounts of compensation and hospital expenses paid to libelant by his employer under the terms of the Longshoremen's and Harbor Workers' Insurance.

5. In holding that by reason of the libelant's injuries he has been damaged in the sum of $125,000.00.

SUMMARY OF ARGUMENTS.

It is herein argued:

1. That the United States is entitled to indemnity from the impleaded respondent, Jones Stevedoring Company, under the terms of a contract between the two parties wherein the Stevedore agrees to hold harmless the United Statess, for any damages arising from personal injury "occasioned in whole or in

part'' by the negligence of the Stevedore, its agents, officers or employees. Under the terms of the contract the Stevedore assumed primary liability for personal injuries occasioned in the performance thereof. The contract excuses them from liability only in the complete absence of negligence on their part. The evidence shows that there was negligence of the Stevedore's employees which contributed to this accident. It consisted of the injured man's own negligence in going underneath a suspended load, contrary to the provisions of the Pacific Coast Marine Safety Code, promulgated for his own safety, and thereby unnecessarily exposing himself to danger; and secondly, in the failure of the Stevedore foreman to warn Luehr to get out from under the plane when he knew that the plane was about to be moved.

2. That the amounts already paid to the libelant by the employer in the form of compensation and medical expenses should be credited to any award the libelant receives since the employer has expressly waived the right to subrogate against the United States, and consequently should not be allowed to recover the compensation payments through the conduit of the injured man. The District Court for the Eastern District of Pennsylvania correctly interpreted this same waiver of subrogation agreement in *Palardy v. U. S.,* 102 Fed. Supp. 534.

3. That the award of $125,000.00 to the libelant is grossly excessive in that it must necessarily contemplate an award of some $85,000 to $90,000 for general, non-pecuniary damages. In cases involving

equally serious injuries resulting in greater degrees of permanent disability to men younger that the libelant, with both greater earning capacity and longer period of working expectancy, the Courts have consistently awarded as reasonable damages sums amounting to far less than half of the award in the present case.

THE STEVEDORE MUST HOLD THE UNITED STATES HARMLESS IN ACCORDANCE WITH THE EXPRESS TERMS OF THE CONTRACT.

The testimony in the record shows the following facts to be true with regard to the manner in which Mr. Luehr was injured. We do not believe there is any serious disagreement between the parties in this respect.

The scene of the accident was described as follows: The USNS SHAWNEE TRAIL was docked at the Army In-Transit Dock No. 3 in Alameda. This dock is in a calm, protected body of water. The SHAWNEE TRAIL was docked port side to the dock. A large Army derrick barge (designated BD3031) was moored to the outboard side of the SHAWNEE TRAIL. On the outboard side of the derrick barge there was moored a barge load of jet airplane bodies, with engine and tail removed.

The SHAWNEE TRIAL was a Navy tanker equipped with what is termed a mechano deck. A mechano deck is a type of superstructure built of steel I beams above the main deck of the tanker. The

beams make up a skeleton-like structure appearing much like the steel skeleton of a building during construction.

The dimensions of this mechano deck are as follows:

I. Columns:

Height (Base Plate to Cap)

Allowing for camber of deck, varies from 7′—9½″ inboard to 8′—9 7/16″ on extreme outboard column.

Allow 3¼″ for height of base plate.

II. Distance between columns:

Longitudinal—12′

Thwartships 8′—4″

III. Transverse Eye Beams:

Length—32′ (approx.)

Width—14¼″

Distance—between 12′

IV. Longitudinal Eye Beams:

Length—13′ (approx.)

Width—6″

Thickness—6″

The Court may better understand the appearance of this deck by observing the model used during the trial. (Resp. Imp. Ex. No. A-1.)

Prior to the accident, eleven or twelve planes had been loaded aboard the mechano deck of the tanker. The method of loading was as follows: The men on the barge containing the airplanes would fasten slings to the planes and to the slings they would attach the

hook from the fall of the auxiliary hoist of the derrick barge. The derrick operator would then lift the planes high in the air and swing them over the deck of the SHAWNEE TRAIL. During this operation the airplanes would be steadied and prevented from swinging by stevedores on the derrick barge and the tanker, who held onto long rope taglines attached to various portions of the airplanes. The derrick operator was seated in the cab of the derrick which is elevated above the deck of the derrick barge. (See Libelant's Exhibits Nos. 8, 9, and 11.) He maneuvered the load in accordance with whistle signals from the derrick barge foreman, who was stationed on the catwalk of the tanker. The airplanes were placed upon the mechano deck in a pattern previously furnished by a representative of the Army. These airplane bodies were fastened securely to the mechano deck by attaching the landing gear of the plane to small wooden platforms which were bolted to the eye beams of the mechano deck. The wheels of the planes had been removed and in their place a small steel tripod was attached to the axle. These tripods were intended to be seated on the platform and secured thereto. These airplanes had three landing struts. One under each wing and one under the nose. Each of these struts was equipped with a tripod, and each was to be fastened to a platform. At the time of the accident a plane had been lifted from the barge and swung over the inboard side of the tanker. It had been lowered to within a few feet of the mechano deck. As the airplane was descending, Mr. Luehr, the

injured man, was instructed by his gang boss to go up on top of the mechano deck to aid in steadying the plane. (R. 538.) In compliance with these orders, Mr. Luehr climbed up on the mechano deck and approached the airplane. The airplane was stopped in its descent and when he got near the plane he reached underneath the wing of the plane and placed his left hand upon the landing gear. He was standing on a thwartship beam, and to steady himself he placed his right hand upon the fuselage of the airplane. (R. 341.)

In compliance with orders of the Stevedore foreman, the signal was then given to the derrick operator to "boom down". This maneuver was intended to move the plane aft and inshore (R. 162), without lowering the plane (R. 218-219).

The derrick operator then leaned forward in the cab to get a clear view, in order to see that his boom would clear the ship's rigging, and in doing so, he caught the sleeve of his coveralls on the friction lever controlling the fall-line to which the plane was attached. (R. 219.) This released the friction and the plane dropped. The wings and fuselage of the plane struck the beams of the mechano deck. (R. 116.) At the time the plane fell Mr. Luehr was partially underneath it, and consequently was struck by the falling plane and was knocked from the beam on which he was standing to the main deck of the tanker.

The first question presented to this Court is whether or not, under the facts of this accident, Jones Steve-

doring Company must hold the Government harmless under the terms of its contract wherein it is provided that Jones "shall hold the Government harmless from any and all loss" for "bodily injury * * * occasioned either in whole or in part by the negligence or faults * * * of his officers, agents, or employees".

More accurately, the question is whether the Stevedore has proved itself to be entirely free from negligence so as to be excused from its general liability under the terms of the contract exception which excuses the Stevedore only if the accident is occasioned "solely" by the negligence of the Government employees.

It is not simply a question of determining the major cause of the accident and placing liability upon the party responsible for it. To the effect that there can be more than one proximate cause, see *Porello v. U. S.* (C.A. 2nd Cir. 1946), 153 F. (2d) 605 at page 607 (later hearing 330 U.S. 446), wherein the Court stated:

> "The unsound notion that there can be but one 'proximate cause' of an accidental injury has caused some confusion in the cases."

This is a case requiring determination of all causes of the accident, and if it be found upon examination that one of the causes is attributable to the negligence of any employee of Jones, then all of the liability must be upon Jones, for they have contracted to be so liable.

For this reason the facts require a thorough, logistical analysis. There are two primary reasons for

the injury to Mr. Luehr. (1) The plane fell, and (2) Mr. Luehr was under the plane. In the absence of either of these factors, there would have been no injury to Mr. Luehr.

The first cause is attributable to the negligence of the derrick operator. The question then remains as to whether or not Mr. Luehr's presence under the plane involved negligence on his part, or on the part of any other employee of Jones.

To determine this, it must be determined whether Luehr's action in placing himself under a suspended load was conduct which fell below the standard to which he should conform for his own protection.

During the course of the trial, the Government submitted into evidence a manual entitled "Pacific Coast Marine Safety Code", copies of which have been made available to the Court (Government's Exhibit "A"). This code is a part of the contract between the Stevedore Union and the employers, and by its terms sets up the minimum requirements for safety of life and limb. (Rule 102, Pacific Coast Marine Safety Code, Government's Exhibit "A".)

Rule 901 of this code provides that sling loads are not to be suspended over men's heads, and naturally the converse is true; i.e., that men are not to be present under loads. The foreman of the Stevedores testified that it was his understanding of the section of the Code that it prohibited men going underneath a suspended load when he stated with regard to the Code "it says a man shall not stand under a load." (R. 164.)

Rule 911 provides further:

> "When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."

The wording of this section should be interpreted to prohibit men from standing under a load. The wording which prohibits longshoremen from standing in line of travel of load and any nearby fixed object is intended primarily to prohibit longshoremen from standing between a traveling load and a bulkhead, but it obviously covers the situation where the travel of the load is downward and the nearby fixed object is a deck. The wording stating that loads be lowered to shoulder height before longshoremen be allowed to take hold of them is obviously intended to prohibit longshoremen from going under a load to steady it.

Mr. Luehr's presence under the load was in violation of the minimum safety practices as established by the stevedores themselves. His negligent exposure of himself to danger and the failure of his employer and himself to exercise reasonable care for his own protection is a legally contributing cause of his harm.

At the trial, both appellee Luehr and appellee Jones attempted to excuse this obvious violation of the standards of safety by attempting to show that it was necessary for Mr. Luehr to be under the airplane at the time in order to perform his job. The great

weight of the testimony directly contradicts this contention. All of the testimony indicates that there was no necessity of going beneath the suspended planes until the landing gears were spotted over the platforms intended to receive them.

This plane was not spotted over the platforms at the time Mr. Luehr went underneath it. This is most convincingly proved by the fact that when it fell the landing gear did not land on the platform, but on the contrary, the landing gear went between the eye beams, and the wings and fuselage struck the mechano deck. The testimony of Mr. Spirz, the walking boss of Jones Stevedoring Company on this point, was as follows (R. 116):

> "Q. Did the plane rest where it fell, or did it bounce or move?
>
> A. The—when the plane hit, when it hit it hit with the fuselage, the belly of the fuselage, and it hit and it bounced.
>
> Q. It hit the——
>
> A. It hit the mechano deck and it actually bounced, and I would say, and I think it bounced a foot."

The fact that it was not spotted over the platform is further shown by Spirz' testimony (R. 115):

> "A. Well, when the plane stopped, Mr. Rosenstock and Charlie, the whistleman, three of us there, I had my hand on the nose of the plane, I always want to know when it stops moving, and *Rosenstock and I agreed we should move it over a little bit more towards the house.*
>
> Q. That would be aft?
>
> A. That would bring it aft * * *"

The derrick operator testified that the plane was stopped three or four minutes at a place two to two and one-half feet from the position over the platform. (R. 218-219.)

The testimony of almost every witness, including both those called on behalf of the impleaded respondent Jones Stevedoring Company, and those called on behalf of the Government, is clear that there is no necessity for being under the suspended airplane until after the landing gear is spotted over the platform. At that time, of course, it is necessary to go under and fasten the tripods to the platforms, but then the danger of injury is minimized, for if the fall should be released, the landing gear would strike the platform, and the body and wings of the plane would remain elevated as when it is normally landed on the ground.

The testimony as to the necessity of being under the plane prior to the time it was spotted over the platform is excerpted, as follows, for the convenience of the Court.

Mr. Spirz, the longshore walking boss in charge of the operation, testified (R. 191):

> "A. At this moment it wasn't necessary to have three men out there, because we still had to move the plane. We were fortunate in one respect, that we had still to move the plane, because we might have had three or five men there at the time the plane dropped. Now, because we had to move the plane over the foot or so nobody was getting underneath to move the platform or the movable beams.

Q. Do I gather from what you say it was unnecessary at that particular stage for anybody to get under there?

A. At that particular point. It was only to hold that plane safe.

Q. In other words, steadying it, not move it.

A. Steady it so it wouldn't move."

Mr. Luehr, the injured stevedore, testified that he was merely attempting to steady the plane from swinging (R. 357):

"Mr. Harrison. Q. I interpret your testimony to be, you were up there to steady the airplane?

A. That is right.

Q. Did you have the platform with you that was going to go underneath the wheel?

A. The platform already was underneath there.

Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform?

A. No, sir.

Q. Were you going to fasten it?

A. No, sir.

Q. You were there to steady it, is that right?

A. That is right."

Mr. Rosenstock, the Army employed supercargo, who was there to watch after the welfare of the airplanes, and who testified he had been present at the loading of hundreds of such planes, testified that the job of steadying the plane could be done by merely holding onto the wing. (R. 478.)

Mr. Nystrom, an expert in handling loading operations such as this, and a witness called by Jones, testified as follows (R. 524):

> "Q. But to be—to make it clear, to the best of your knowledge, it is not necessary for a man to go under there to do anything with the tripods until it arrives over that platform, is that right?
> A. Yes."

Mr. Greene, a fellow longshoreman of Luehr, testified he was performing the job of steadying by holding onto the wings (R. 535):

> "Q. Just what were you doing to steady the plane as it came down?
> A. I had hold of the wing."

Mr. Lemkuhl, a volunteer expert called by the Government, and a man who had loaded many planes on mechano decks, and in fact the man who loaded Jimmy Doolittle's planes for the historic bombing of Tokyo, said:

> "It wasn't absolutely necessary for people to go under the plane. Some of my people did it and were reprimanded rather sharply for it." (R. 588.)

Mr. Lemkuhl's testimony on this most pertinent point was as follows (R. 592):

> "A. As you lower it down, you control the airplane by using tag lines, and it is barely floating above the platform or footing, and before anyone can go underneath to touch any part of the airplane."

Mr. Lemkuhl stated in cross-examination (R. 593):

"Q. But sometimes they don't land square.

A. That could be true, but I stated that I did not allow any personnel under the plane until it was practically in a resting position with the oleo strut hanging down."

Mr. Lemkuhl again stated in redirect examination (R. 596):

"Q. Before the landing gear gets over the landing platform, is there any necessity for the man to go under the plane?

A. No, sir. I wouldn't permit it."

Mr. Holbrook, another expert called by Jones Stevedoring Company, testified as follows (R. 613):

"Q. Is there ever any necessity for holding onto it before it arrives at the platform?

A. No, because you have to hold with the tag lines until it reaches——"

Mr. Holbrook again stated on cross-examination (R. 619):

"Q. Until the landing gear of the plane arrives—to please Mr. Kay, I will say within the square footage of the platform, that is, within that area directly above the platform—is it necessary for a man to go underneath that airplane and hold on to that landing gear until that time?

A. No, not until——

Q. It is not?

A. Not until it is over the platform, no."

From this testimony, which was never directly contradicted, it can be seen that it was unnecessary for

Mr. Luehr to be under the airplane at that time, when there were still operations to be performed by the derrick in moving it to a place over the platforms. It is clear that the job of steadying the plane could have been done effectively by placing his hands on the wing at shoulder height, and that it was not necessary to place himself in a position of danger to do his job.

The law is clear that where there is a safe way to do a job and a dangerous way, and the man chooses a dangerous way, his act is negligent. *Larsson v. Coastwise Line* (9 C.C.A. 1950) 181 F. (2d) 6. The rule is stated in 65 *C.J.S.* Section 122, page 732, as follows:

> "One having a choice between two courses of conduct is contributorily negligent in pursuing a course which is dangerous rather than one which is safe, where an ordinarily prudent person would not have so chosen."

In *Uzich v. E. & G. Brooke Iron Co.* (D.C.E.D. Pa. 1947), 76 F. Supp. 788, a steeplejack painter was held contributorily negligent in grasping a cable for the purpose of moving around the cable, with the result that his hand was injured when the cable began to move. Evidence indicated he could have gone around the cable in a safer manner. The Court stated at page 789:

> "Of course there was no absolutely safe way to do plaintiff's job. * * * However, he could have done it without the slightest risk of being injured in the way he was. The choice was between an

> at least comparatively safe way, and one that was highly dangerous."

The fact that there was a comparatively safe way to do the job of steadying the plane is evidenced by the fact that there were other men doing the identical job in a different manner (i.e., holding onto wings and staying out from under the plane) and were not hurt by the plane's fall.

The doctrine was recently applied in the Northern District of California, Southern Division in *McKenney v. U. S.* (D.C. N.D. Cal. S.D. 1951), 99 F. Supp. 121. In that case libelant was in charge of a lifeboat drill and during the time the boat was being lowered to the water he chose to stand on the stern thwart instead of standing in the bottom of the lifeboat or sitting on the thwart. The boat was dropped to the water through the negligence of the boatswain in tripping a releasing gear. The Court stated, at page 124:

> "Since none of the other occupants of the lifeboat * * * suffered anything but minor injuries, it seems evident that the libelant could have placed himself in a safer position."

The Court went on to reduce the award 50% by reason of libelant's negligence.

The negligence of Mr. Luehr himself is enough to bring the hold-harmless clause of the contract between Jones and the Government into operation, for the contract specifically provides that Jones will hold the Government harmless for any bodily injury caused

in whole or in part by any *employee of* Jones. The negligence of Luehr also deprives the Stevedore of the contractual exemption from its general liability, for the negligence of Luehr, its employee, obviates the possibility that the accident was caused "solely" by an act or omission of the Government or its employees.

In addition, there is the negligence of the Jones' foreman, or walking boss, in having Mr. Luehr ordered up to the mechano deck and in failing to warn him to get away from his position of danger partially under the airplane, when he knew that the load was to be moved. Mr. Spirz, the walking boss, testified that not only did he fail to warn Mr. Luehr not to go under the plane, but that he approved of his presence there. Mr. Spirz testified (R. 124): "If he can reach, when he can reach the plane, then it is permissible to get under it."

In *Barbarino v. Stanhope S.S. Co.* (C.A. 2d 1945), 151 F. (2d) 553, the Court of Appeals reversed a District Court decree, dismissing the petition impleading a stevedore in a case where a longshoreman was injured by a boom falling by reason of a defective bolt and the shipowner sought to hold the stevedore for negligence of its foreman in permitting libelant to expose himself to the dangerous situation. Judge L. Hand said (page 555):

> "It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it is most uncommon for

> a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means."

It was the duty of Mr. Spirz, as a walking boss of the stevedore gang, to look after the safety of his men. (R. 129.)

There is, therefore, the negligent commission of an act by an employee of Jones (Luehr) and the negligent act of omission (in failing to warn, instruct or prohibit) by an agent of Jones (Spirz). The burden of proof is upon the Stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions. *Pan Am. Petroleum Co. v. Robins Dry Dock & R. Co.* (2nd Circuit 1922), 281 Fed. 97, 109. This burden they have not met.

Not only does the law put the burden of showing the absence of negligence upon the Stevedore, but the terms of the contract also emphasize that it was the intention of the contracting parties that the Stevedore was to be liable for personal injuries occasioned during the work under the contract with few specific exceptions.

Article 14(a) 2, states in the final sentence—"The general liability and responsibility of the contractor under this clause are subject *only* to the following specific limitations. * * * b(2) If the damage, injury

or death resulted solely from an act or omision of the Government or its employees * * *."

It is plain to see that under this contract the general liability for personal injury lay with the Stevedore; therefore, to escape such liability they must prove that the injury was caused solely by negligence of a Government employee.

It is to be remembered that the Stevedore was in sole and exclusive control of this loading operation. The barge foreman, who was a Government employee, took his directions from the Stevedore walking boss and relayed them to the crane operator. The Stevedore and the Stevedore alone had the responsibility for the safety of its men. The terms of the contract provide that in the event of bodily injury the Stevedore shall be held liable unless entirely free from negligence. In light of the clear and convincing evidence that Luehr was allowed to be under a suspended load in violation of the express terms of the stevedore's own Safety Code, it cannot be said that the Jones Stevedoring Company has successfully carried the burden of showing absence of negligence on their part.

It is therefore respectfully submitted that the hold-harmless clause of the contract must be adhered to, and the Jones Stevedoring Company be required to indemnify the Government. There is no inequity in requiring Jones Stevedoring Company to bear full liability for partial fault in accordance with the terms of the contract. The terms of the contract are not severe in light of the insurance provisions and the background.

The case of *American Stevedores, Inc. v. Porello* (1946), 330 U.S. 446, 91 L. ed. 1011, 1947 A.M.C. 349, involved a similar situation wherein the parties to the action had the same relationship to one another that the parties have here. In the *Porello* case, the contract between the Stevedore and the Government provided (page 457):

> "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing same * * * through negligence or fault of the Stevedore, his employees, and servants."

The Supreme Court found this clause ambiguous and subject to three interpretations. (1) The Stevedore should indemnify the United States for damages solely caused by the Stevedore's negligence; (2) the Stevedore should indemnify the United States for damage caused in any part by Stevedore negligence; and (3) the Stevedore, in the case of joint negligence, should be responsible for that portion of the damages which its fault bore to the total fault. On remand to the District Court the District Judge held the contract to require full indemnity to the United States in a situation of joint negligence (1950 A.M.C. 2071), but to avoid any such difficulty in the future, the standard form of contract was amended. The present contract is clear that the Stevedore agrees to be fully liable for injury caused "in whole or in part" by the negligence of its employees.

The contract in this case provides that the Stevedore shall carry bodily injury liability insurance, and

such insurance was carried by Jones (Government's Exhibit B, Sec. 14(c)). (R. 546.)

This contract contemplates that the Stevedore is to perform the stevedoring operation as an independent contractor thereby avoiding the Government's invasion of the stevedoring field, and leaving the work to private enterprise. In so doing, the Stevedore is given the most advantageous contract possible, and to eliminate duplication of expensive equipment the Government agrees to loan to the Stevedore, free of charge, a heavy lift floating crane and operator for it. (Government's Exhibit B, Article 1(h)1.)

In addition, the Government requires that the Stevedore carry compensation insurance and liability insurance. The Government then allows the cost of the insurance to be calculated in the costs upon which the Government gives the Stevedore an over-riding percentage. This arrangement results in the Government indirectly paying the premium on the insurance. Testimony of Mr. Elzey, Assistant Chief of the Procurement Division, San Francisco Port of Embarkation, covered this point as follows:

> "Mr. Harrison. Q. Mr. Elzey, do you have anything to do with the computation of rates that are paid under this contract?
>
> A. Yes, Mr. Higbee does the negotiation, and when he has arranged the negotiation and determined the rates, I actually compute the rates.
>
> Q. How are the rates computed, Mr. Elzey?
>
> A. The contract provides for payment to the stevedoring contractor on what we call a commodity basis?

The Court. Commodity basis?

A. Commodity basis.

The Court. What do you mean by commodity basis?

A. We pay the contractor so much per ton for loading different classes of cargo.

The Court. I see.

A. And tonnage rates are arrived at by determining the cost of a longshore gang for one hour; and to this direct cost is added an over-riding percentage to compensate the contractor for his expenses, plus an allowance for profit.

Mr. Harrison. Q. Then, in effect, it is a—although not technically a cost-plus contract, in effect is amounts to that, is that right?

A. That is what it is. Pay the contractor's expenses plus a certain amount for profit, yes.

Q. I see. Now, you say that you do work in computing these costs, is that right?

A. Compute contract rates, yes.

Q. In these costs, is there included cost of insurance covering the Stevedore's operations?

A. In the over-riding percentage there is an allowance for what is known as payroll insurance, which is the workmen's Compensation Insurance—State, and Workmen's Compensation Insurance—Federal.

Q. So that, in effect, Mr. Elzey, the Government who pays Jones Stevedoring Company under this contract—in effect pays the premiums on that insurance, is that correct?

A. They pay the stevedore contractor money with which him to pay the premium, yes, sir."

(R. 543, 545.)

Since the Government pays the premium on the insurance covering accidents occasioned during these stevedore operations, naturally the Government wishes to be protected also. This is done by the proviso in the contract with the Stevedore that the Stevedore must indemnify the United States for any liability occasioned during the stevedoring operation, in whole or in part, through the negligence of the Stevedore employees.

The Government is paying for the contractor's insurance, and there is nothing inequitable in requiring that the insurance inure to the benefit of the Government by way of indemnity-over from the Stevedore, which presumably can collect from the insurer.

The findings of the District Court that there was no negligence of the Stevedore are clearly erroneous and should be disregarded.

The findings of the District Court that the Stevedoring Company was not guilty of any negligence is not strictly a finding of fact which this Court must adhere to unless clearly erroneous. The finding involves not necessarily a fact, but is a conclusion of law regarding the standard of care required by the stevedores for the protection of their men. Appellate Courts sitting in admiralty have found such findings clearly reversible. See *Barbarino v. Stanhope SS Co.* (2nd Cir., 1945), 151 Fed. (2d) at page 555, wherein the Court stated:

> "It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is

> conclusive upon it as it is upon any other question. For the jury is deemed—rightly or wrongly —to be as well qualified to set such a standard as a judge. But where the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called." (Citing cases.)

In addition it is to be noted that in neither the case of Luehr against the United States nor the case on the impleading petition did the judge himself make findings of fact and conclusions of law. In each case the findings and conclusions prepared by successful counsel were adopted bodily by the Court. Indeed, in the case on the impleading petition they appear in the record with caption, "Findings of Fact and Conclusions of Law submitted by Jones Stevedoring Company, respondent-impleaded" (R. 50).

It is elementary that where the trial judge does not make findings of his own, using the proposals of counsel for both parties as a guide to assist him in reaching his own decision, but merely accepts the findings prepared by successful counsel, the Appellate Court should not treat such purported findings as entitled to weight given findings made by the trial judge himself; e.g., *The Severance* (4th Cir., 1945), 152 F. (2d) 916-918 (Citing cases).

But in any event, we believe that, as shown herein, the purported findings found in the record at bar are clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Jones

were free from negligence, which was a contributing cause of Mr. Luehr's injury.

It is respectfully submitted that Luehr was negligent in placing himself in a position of danger under the airplane when the job of steadying the plane could have and should have been done safely by placing his hands upon the wing. In addition, Jones' foreman was negligent in not warning Luehr to get out from under the plane when he knew the plane was about to be moved, and should have known, as an experienced stevedore, that in moving a load there is always the possibility of the load falling.

By reason of this negligence, the Jones Stevedoring Company is liable to indemnify the United States under the terms of the contract.

THE SUMS ALREADY PAID BY WAY OF COMPENSATION AND MEDICAL EXPENSES MUST BE CREDITED TO ANY AWARD TO THE LIBELANT.

In accordance with provision 14(c) of the contract between Jones and the Government, Jones obtained and carried Workmen's Compensation Insurance and Harbor Workmen's Compensation Insurance. The policies provide:

> "Anything in the policy to the contrary notwithstanding, it is understood and agreed that the company waives all right of subrogation against the United States of America that it might have by reason of payment under this policy." (Gov. Exs. C and D, R. 551, 552.)

In accordance with the provisions of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 904), Jones, the employer of Luehr, became liable to pay compensation and medical expenses arising from the injury to Mr. Luehr. The primary liability for these payments lay with the employer, Jones.

Prior to the trial in the District Court, Mr. Luehr received $3,082.20. This was given to him by payments of approximately $33.00 a week. Mr. Luehr never reduced his claim to an award before the Compensation Commission, nor did he ever file formal notice of intention to sue a third party.

In addition to the compensation, medical expenses incurred by Mr. Luehr were paid in the sum of $7,322.32.

Although the District Court did not enumerate any separate items of damage in the findings, it was recited that the $125,000.00 included all of Luehr's general and special damages. (Finding XV in Findings covering case libel of Luehr v. United States.) (R. 68-69.) As a consequence, the sum of $125,000.00 includes the special damage of hospital expenses which have already been paid to Luehr by the employer, Jones.

In addition, the $125,000.00 includes loss of wages to the time of the trial, a portion of which Luehr has already received in the form of compensation in the amount of $3,082.20.

In the absence of any specific provision to the contrary, these items would be proper items of damage

against a third party, because the employer Jones could demand and receive from the injured party, repayment of these amounts out of the judgment against the third party. Under the ordinary situation, then, the third party pays these items of damage to the injured man, who in turn pays them over to his employer. In other words, the employer recovers his compensation payments through the employee's suit against the third party.

But in the instant case the employer has expressly waived its right to recover these payments from the particular third party, the United States. To allow the libelant to recover these two items of special damages in full from the United States, and thus in turn entitle the employer to recover from the libelant the sum paid to him, amounts to a circuitous way of violating the anti-subrogation agreement.

The United States has protected itself from liability for amounts Jones might pay by way of compensation by the express terms of the insurance policies required under the contract with Jones. These express terms must be respected. The judgment against the United States should be reduced by the amounts paid by way of compensation and medical expenses, i.e., $10,404.52.

In the case of *Palardy v. United States,* 102 F. Supp. 534, decided January 21, 1952, in the Eastern District of Pennsylvania, this identical question was presented and Circuit Judge Kalodner correctly credited to the judgment awarded in that case, the amounts paid by way of compensation, stating:

"Accordingly, I have found that libellant suffered damages compensable by the sum of $18,000. This figure has been reduced 25% or $4,500.00 because of libellant's contributory negligence, leaving him an award of $13,500. Since libellant has already received the sum of $325.00 representing payment voluntarily made by Luckenbach's compensation carrier under the Longshoremen's Act, I have reduced the award by this amount to $13,175.00. However, while I have credited this amount to the decree against the original respondents, I am making no affirmative decree in favor of Luckenbach, as the latter has expressly waived its rights against respondent as subrogee, under Section 33 of the Act. I have not allowed recovery of the $439.35 medical expenses, since they were paid by Luckenbach's insurance carrier."

It is respectfully submitted that the District Court erred in failing to credit to the award against the original respondent the sum of $10,404.52.

It follows, of course, that a finding that the United States is entitled to indemnity from Jones, would necessitate an identical reduction of the judgment in the amount already paid by Jones.

THE AWARD OF DAMAGES IS GROSSLY EXCESSIVE.

The District Court awarded to libelant the lump sum of $125,000.00 to cover both special and general damages. (Findings in Luehr v. United States, No. XV.) (R. 68, 69.) The Court did not determine any

separate items of damage. This figure does not appear warranted under the facts.

Mr. Luehr was born March 11, 1899. (R. 284.) He was 53 years old at the time of the trial in March of 1952. He could reasonably have anticipated remaining actively engaged in stevedoring work until approximately age 65. He himself testified to that effect. (R. 336.) By reason of the accident he will lose earnings during the remaining 12 years of his working expectancy. This method of determining the time over which the loss of future earnings is to be computed is the most logical, and is the accepted practice. The Circuit Court opinion in *Porello v. United States* (2d Cir.), 153 F. (2d) 605, at page 608, which concerned a stevedore injured at the age of *52,* states with regard to the District Court opinion allowing loss of earnings for full life expectancy as follows:

> "On the other hand capitalization at 2½% for 17 years was too favorable to the libelant both in respect to the rate and the number of years he could continue to do the heavy work of a stevedore. If we took an annual loss of $1275 (75% of $1700) capitalized at 3% for *ten* years, the present value of future loss of earnings would be $11.200." (Italics ours.)

This Court, therefore, felt that the stevedore's working expectancy ended at age 62.

See also *Brenton v. United States* (D.C. E.D. N.Y., 1949), 1949 A.M.C. 1812, wherein the Commissioner states:

> "A fisherman who was killed when he was 51 years old was entitled to his earnings for an expectancy of approximately 15 years."

Gell v. United States (D.C. S.D. N.Y., 1949), 85 F. Supp. 717, 1949 A.M.C. 1719, involved a stevedore killed at 49. In computing loss of expected earnings, the Court stated:

> "* * * it is unlikely that deceased would continue the heavy work of a stevedore after he was 65."

Also in *Johannsson v. United States* (D.C. E.D. N.Y., 1949), 1949 A.M.C. 1802, involving the master of a fishing trawler who was permanently disabled, the Commissioner found:

> "* * * libelant could not have reasonably expected to have worked as the master of a fishing trawler beyond the age of 65.
>
> I therefore find that at the time of the trial he had probable expectancy of a working life in his former employment of 25 years. It is probable future earnings should be capitalized at 3% for 25 years."

The accepted method of estimating future loss of earnings is to examine earnings the past years and average them out. In 1948 Luehr earned $3,063.57. (R. 286.) In 1949 he earned $4,252.07. (R. 287.) His earnings in 1950 up to the time of the accident were approximately $54.00 a week ($1,548.00 divided by 29 weeks). (R. 288.) In fact, Luehr's own union reported to the compensation commissioner that his average earnings were only $49.00 a week, and as a

consequence the compensation payments were reduced from the maximum of $35.00 a week to $33.32 a week. (Resp. U.S.A. Ex. E, R. 333.) If he had continued to work at the rate of $54 a week he would have earned $2,808 in 1950. In the year 1950 he did not work all the available port hours during the time that he worked, so the computation introduced by counsel for libelant, of what a man would have earned had he worked all the available hours, is irrelevant.

For the three years 1948, 1949 and 1950, Luehr's average earnings may be said to be approximately $3,400.00 a year.

Mr. Luehr is not totally disabled, and it is reasonable to assume that with personal diligence he could earn a minimum of $500.00 a year. Dr. Keene Haldeman testified that he believed Mr. Luehr could eventually do some sort of sedentary work. (R. 423, 424.) Dr. Walker also testified that Mr. Luehr could do some sort of "sedentary type work". (R. 405.)

This would give him an average expected loss of earnings of approximately $2,900.00 a year.

Capitalized at 3% for 12 years equals $18,966.00.

When computed on the average loss of earnings of $3,600.00, which is the most favorable possible view under the facts, the loss of earnings for 12 years capitalized at 3% equals $24,134.40. This would require that no deduction be made for income tax and the assumption that Luehr is totally, permanently

disabled, and will never make another dollar, and that his earnings would have increased in future years. These assumptions are not justified, especially in view of the doctors' prognosis.

Without regard to the compensation he has received, his loss of earnings to the time of the trial amounted to between $49.00 a week and $54.00 a week for 20 months. Mr. Luehr was married and entitled to take his wife as an exemption on his income tax. This would have given him a take-home pay in the sum of approximately $190.00 a month. In 20 months his loss would be $3,800.00.

As previously pointed out, this figure should be reduced by the sum of $3,022.20, which he received by way of compensation, but for the purpose of showing the excessiveness of the award in the District Court, this will not be considered here.

The total medical expenses to the time of the trial were $7,322.32. The major surgery and hospital care has already been taken care of. The future hospital care should not exceed $2,000. (R. 398, also R. 403.)

Consequently, it can be seen that the total amount of these estimable damages could not exceed $35,000 to $40,000.

This means that the remaining $85,000 to $90,000 were awarded to compensate for pain and suffering.

Admittedly, Mr. Luehr suffered severe discomfort by reason of his injury, but such a monetary award to cover pain is unreasonable and unprecedented.

Mr. Luehr's injuries are set out in medical detail in the Findings of Fact. (R. 64.) They are listed as follows:

1. Compression fracture of the first lumbar vertebra, with marked displacement posteriorally and anterior wedging.

2. Fracture of the neural arch of the first lumbar vertebra.

3. Fracture of several transverse processes and lamina of the vertebra.

4. Derangement of the lumbar-sacral joint, with a complete collapse of the fifth lumbar interspace.

5. Injury to several of the intervertebral discs in the lumbar spinal area.

6. Contusion of the spinal cord, and scar tissue in the cord.

7. A mesenteric thrombosis, resulting in a paralytic ilias, or paralysis of the bowel.

8. Thrombo phlebitis of both legs.

9. Oblique fracture of the left clavicle.

10. Fracture of at least six ribs and a tremendous concussion injury of the entire chest.

11. A compound comminuted fracture of the left tibia, with removal of the anterior cortex, and osteomyelitis.

12. Fracture of the left fibula at both the upper and lower ends.

13. Avulsion fracture of the right astragalus.

Although the list of these injuries is impressive, it is to be noted that Mr. Luehr testified that he did not have a great deal of pain while he was in the hospital. (R. 299.) This period consisted of 100 days. Although there were thirteen separate injuries listed, five of them were completely overcome, or substantially mended during this period, in which Mr. Luehr states he did not suffer a great deal of pain. The mesenteric thrombosis, resulting in a paralytic bowel, was completely subsided. (R. 365.) The thrombophlebitis of both legs subsided. The fracture of the left clavicle and fractures of the ribs, the fracture of the transverse processes and the avulsion fracture of the right astragalus, being all simple fractures, healed during that period. Mr. Luehr testified that he had no pain in his shoulder as a result of the clavicle fracture. (R. 301.)

There remained unhealed the fracture of the vertebra. This allegedly subsequently caused Luehr to suffer pains in his left hip; however, he testified that during the first 100 days in the hospital he had no pain in his hips. (R. 299.)

There also remained unhealed the compound fracture of the tibia and fractures of the fibula of the left leg. In this regard Mr. Luehr testified that he did not have a great deal of pain in his leg. (R. 301.)

At the time of the trial, Mr. Luehr testified that his only complaints were pain in his back, left hip, running down below the knee (R. 306), and that his right ankle was sore when he walked (R. 310).

With regard to future pain in his back, Dr. Walker testified that at the time of the trial, nature had fused the displaced vertebra about 50%. (R. 400.) He further testified that he would advise performance of a back fusion operation which would complete the union and "should take quite a bit of pain out of his joints, should prevent further calcification and demineralization, some of which has occurred. I expect it to stiffen his spine, but it will be comfortable and will be painless." (R. 402.)

Dr. Haldeman testified, "I would expect a progressive improvement in the back pain, and it may be entirely relieved by time." (R. 424.)

In the findings presented by counsel for Mr. Luehr, they list as a permanent disability, in addition to the back injury above mentioned, osteomyelitis of the left leg. In this regard, Dr. Walker testified (R. 399), when asked if he expected the infection to clear up: "We expect it to. It is down so much in quantity that we hope it will clear up. There is no guarantee that it will, but expectations from the history, his general condition, all indicate this will clear up."

With regard to the fracture of the left tibia, Dr. Walker testified it had united in "fairly straight, firm, solid leg" (R. 379); and further stated that clinically, the leg has healed very firm (R. 382). With regard to the fracture of the left fibula, which libelant's findings listed as the eighth permanent disability, Dr. Walker testified that it resulted in no permanent disability (R. 382) and was "unimportant".

With regard to the traumatic arthritis of the left hip, which the findings list as the fifth permanent disability, Dr. Walker testified that this was caused by "post-traumatic regressive change" which "may clear up and it may stay right where it is". He agreed that it may get better, and stated "but most of the time they lose the pain". (R. 394-395.) Dr. Haldeman said he saw no significant difference in X-rays of right and left hip other than slight decalcification of left hip. (R. 446-447.) Dr. Haldeman further testified that the pain in the left hip may be relieved by the use of an elevated heel on the left shoe to more nearly equalize the length of the legs. This elevation need not be over ½ inch. This would also alleviate any difficulty occasioned by the shortening of the left leg some ¾ of an inch. (R. 422.)

With regard to the traumatic arthritis of the right ankle, listed in the findings as the sixth permanent disability, Dr. Haldeman's examination indicated the fracture was fully healed. (R. 420.) Although listed as a permanent disability in the findings, Dr. Haldeman testified Luehr made no complaint about the right ankle at the time he appeared for examination. (R. 444-445.)

With regard to the rib fractures, Dr. Walker testified that they are completely healed, and no disability can be expected from the ribs as such. (R. 370.) Luehr made no complaint about his ribs to Dr. Haldeman. (R. 420.)

Consequently, it can be seen that the only disabilities which can be described accurately as permanent

are those listed in the findings as "extensive spinal disability" (Finding XI, Injury 1) and "spinal cord injury resulting in scar tissue in spinal cord which has left spinal cord in a permanently damaged condition." (R. 66.)

As to the "serious and extensive spinal disability", the only reference that is found in the record is the statement of Dr. Walker that the back fusion will "stiffen his spine but will be comfortable and painless". (R. 402.)

The scar tissue in the spinal cord apparently does not cause any symptoms of which Mr. Luehr complained. The injury to the cord apparently caused a temporary paralysis of the bowel and a masenteric thrombosis, but these symptoms were overcome in the hospital, and nowhere in the record is there any reference to their possible re-occurrence.

In summary, it appears at the time of the trial that Mr. Luehr was suffering from a compressed fracture of the first lumbar vertebra, which caused him pain and limited his motion, a ¾ inch shortening of the left leg, and pain in right ankle when he walked. It was the testimony of the doctors that the pain from the back would be relieved either by a surgical fusion or by time. The pain in his left hip should also be relieved by the operation. If the pain in the left hip arose as a consequence of the shortening of the left leg, Dr. Haldeman testified it would be alleviated by the wearing of an elevated left heel on his shoe.

This man is not bedridden, he has no paralysis, nor is he entirely disabled from work. The prognosis on each of his pain producing disabilities was favorable.

A review of recent Federal decisions discloses no cases where an award of this magnitude was made in similar circumstances. A very similar case was decided in the District Court for the Eastern District of New York on January 26, 1950 (*McCarty v. United States,* 88 F. Supp. 251). In that case the injured man was 49 years old. His injuries were described by the Court at page 257 as follows:

> "He suffered fractures of the left leg, right shoulder, right leg, spine and ribs." (Virtually identical with those of Mr. Luehr.)
>
> "These proved partially disabling, and were of course the source of pain and suffering; the healing of the fractures has left him subject to restrictions of movement and function. He cannot resume his occupation as a longshoreman. His earning capacity has not been destroyed, but it has been impaired, and while re-employment in another calling is highly desirable for his own sake at least, it may not be easy of accomplishment, since he is 49 years of age.
>
His loss of wages at $70 per week from the date of the accident to the trial is computed at	$8,700.00
Medical and hospital expenses incurred and to be reimbursed	1,041.00
	$ 9,741.00
For the injuries themselves and loss of earning capacity, a just award is thought to be	$25,000.00
Total	$34,741.00"

That case involved a man who earned more than Mr. Luehr and had four years more working expectancy, and suffered virtually the same disabilities. Admittedly the size of the hospital bill shows that his recovery was not so involved as Mr. Luehr's, but the Court found a just award to be virtually $90,000.00 less.

See also *Badalamenti v. United States,* 67 Fed. Supp. 575 (D.C. E.D. N.Y. 1946) (affirmed in part and reversed in part, 160 F. (2d) 422) where a 35 year old stevedore received $52,000.00 for injuries, including severe cerebral concussion, fractured jaw and femur, making it impossible for him to ever resume his work as a longshoreman, and necessitating in excess of $4,000.00 for hospital and medical expenses.

See *Denny v. Montour R. Co.,* 101 F. Supp. 735, decided in the Western District of Pennsylvania on December 7, 1951, a 40 year old plaintiff who was completely and permanently disabled, who had been earning $300.00 per month, and at the time of the trial had lost twenty-two months wages of $6,600.00, the Court found an award of $80,000.00 to be reasonable. In the course of the opinion the Court stated at page 743:

> "Since the accident the plaintiff has been severely crippled, ridden with constant pain, unable to work and compelled to wear an uncomfortable brace and to sleep, when sleep comes upon him, in a plaster cast. He has been rendered incapable of moving about in a normal manner, being forced to walk in an ungainly

fashion, throwing his body and limbs about and attracting the pitying attention of those who see him. He will require further medical care and attention, and it is extremely improbable that he will ever again be able to engage in a gainful occupation. Plaintiff's life will always be one filled with pain, suffering and inconvenience. In short, he is and will be a truthfully pitiful figure of a man."

Two other awards for very serious injuries, made by Judge Goodman of the same Northern District of California, Southern Division, bear comparison. In the case of *Wibye v. United States* (D.C. N.D. Cal. S.D. 1949), 87 F. Supp. 830, the award to two seriously injured brothers was made as follows at page 833:

"As a result of the accident, plaintiff Harold Wibye shuffered a cerebral concussion resulting in loss of vision in his left eye and severe headaches, wrenching of the neck and upper back, with post traumatic parascapular myositis bilaterally, and other lacerations abrasions and nervous shock. As the evidence showed, he was unable to follow any occupation for the 141 weeks between the accident and the trial. Medical testimony was that he would need further hospitalization for treatment of his neck and that further repairs to his knee, which had been severely lacerated, were required. The medical proof further showed that the injuries are of a permanent nature and that Harold Wibye will never be fit to follow his occupation. He was 40 years of age, and a superintendent of building construction, earning approximately $125.00 per week at

the time of the accident. Lost earnings amount to some $17,625.00 and medical and hospital expenses were approximately $2,160.00. After taking into account the nature of the injuries, the age of this plaintiff, his reasonable life expectancy, his lost earnings and medical expenses and the present value of his future loss of earnings, I have concluded that a proper award would be the sum of $45,000.00."

"Niels K. Wibye suffered more severe injuries than his brother. He also had a cerebral concussion and in addition a fracture of both hips and his right knee, resulting in considerable limitation of motion thereof. In addition, he suffered injury of the tendons of the right wrist and other deep and painful lacerations. He was confined to the hospital for many months, where he underwent surgery in an attempt to repair the fractures of the hips and knee. His injuries are permanent in character. At the time of the accident, he was 41 years of age, and was a carpenter foreman, earning approximately $100.00 a week. Loss of earnings at the time of the trial was $14,000.00; medical and hospital expenses amounted to $4,505.56. Taking into account his age, occupation, lost earnings, medical expenses, present value of his future loss of earnings, his reasonable life expectancy, and the nature of his injuries, my finding is that an award of $60,000.00 would be proper."

These awards involved younger men with longer working expectancy, who also suffered injuries which permanently disabled them from returning to their occupations. At the time of the trial they had lost

wages for 141 weeks as compared to Luehr's loss of 80 weeks, and yet the largest award was less than half of that given to Mr. Luehr.

Mack v. United States, 105 F. Supp. 149, is another recent case decided May 12, 1952 in the District Court for the District of Massachusetts. In that case a ship's rigger was injured in the leg and the injury resulted in permanent total disability. The man was fourteen years younger than Luehr at the time of his injury, and earned $20 a month more than Luehr. His condition after treatment was in some ways similar to that of Mr. Luehr. It was described as follows at page 151:

> "* * * he has suffered pain and swelling almost constantly. He has been and is still unable to stand for extended periods of time because of swollen painful extremities. He is unable to walk any appreciable distances."

The prognosis was worse than that of Luehr, for the Court further stated:

> "He has reached an end result, is not employable and is permanently and totally disabled. The prognosis is, as one medical expert aptly described it 'dark' ".

Under these facts an award of $85,000 was given. It is obvious that with 14 years more working expectancy than Mr. Luehr, and considerable greater earning capacity, the award included more than twice the amount of loss of future wages, and yet it still was $40,000 less than the one under consideration.

The cases are very numerous wherein men with considerably more earning power, and many years more of working expectancy, have been totally and painfully disabled, and the awards are considerably less. Without burdening this Court with excessive citations, the following are mentioned briefly. The citations are limited to recent cases in order to eliminate any discrepancy between the purchasing power of the dollar at the time of the award and the purchasing power at the time of Mr. Luehr's award.

Lewis v. Pennsylvania R. Co. (E.D. Pa. 1951), 100 F. Supp. 291, involved a 34-year-old locomotive fireman having an earning capacity of $395.00 a month (compared to Luehr's $220.00) and a working expectancy of 31 years (compared to Luehr's 12 years), who was awarded $60,270 for rupture of intervertebral disc resulting in total disability up to time of trial, and possibly permanent total disability.

A larger award ($150,000.00) was sustained as reasonable in *Trowbridge v. Abrasive Co. of Philadelphia,* (3rd Cir. 1951), 190 F. (2d) 825, by Circuit Judge Staley in the Third Circuit, but it is important to note that the plaintiff in that case was a machinist with nine years more working expectancy than Luehr. Although no earnings are given for Trowbridge in the opinion of the Court, it can be reasonably assumed that a skilled machinist wage was considerably above that of Mr. Luehr. In addition, the $150,000 included $23,817.76 for hospital expense and compensation paid and repayable.

Stokes v. U. S. (D.C. S.D. N.Y. 1944), 55 F. Supp. 56, (damages affirmed, 2nd Cir. 1944), 144 F. (2d) 82, involved an injury to a marine engineer and as a result he had three operations to his leg and was in hospitals a total of 274 days. At the time of the trial he had an arrested case of osteomyelitis. The Court stated, at page 58:

> "He will never have a firm union of the bones of the right leg. He cannot bear his weight on it. A supporting brace and a cane or a crutch will help him get about haltingly. The alternative is amputation and an artificial leg from some point below the knee. Libelant is permanently disabled and barred from following his trade as a marine engineer."

The Court of Appeals found that $7,500.00 was a reasonable award for the pain and suffering (144 F. (2d) at page 87). This emphasizes that the award in this case of between $85,000 to $90,000 for pain and suffering is grossly excessive.

In *Johannsson v. U. S. A.,* 1949 A.M.C. 1802 (supra), involving a man who suffered an amputated left leg, the commissioner found that $15,000 was reasonable compensation for pain and suffering, past and future. In this regard, he stated:

> "The evidence establishes beyond any doubt that libellant Johannsson suffered intense agony from the time of the accident on October 21, 1945, until he was discharged from the hospital on April 16, 1946, nearly six months, and that after undergoing five operations, of which three at least were very serious, he is still suffering and

> may always have some pain, real or 'phantom'. It has been repeatedly said in the decisions that it is difficult to measure the value of pain and suffering in money. It is unnecessary to recite here the convincing testimony which libellant gave as to the intensity and extent of his suffering. Respondent's counsel does not deny that he suffered and concedes that libellant 'has been through a lot'. I can only weigh what he testified to and his apppearance when he testified before me to reach a conclusion as to what he should receive. After giving careful consideration to these factors and to the medical evidence, I find that $15,000 for his past and future pain will be fair compensation."

It is respectfully submitted that in light of Mr. Luehr's past earnings, his working expectancy, the nature of his injuries, and the extent to which he had recovered at the time of the trial, the award of $125,000.00 is grossly excessive.

This Honorable Court very recently had before it a case involving an award of $100,000.00 to a railroadman who lost the lower portion of his right leg in an accident. *Southern Pacific Co. v. Guthrie* (9th Cir. 1949), 180 F. (2d) 295, rehearing reported 186 F. (2d) 926. In that case the Court stated, at page 928:

> "Under the circumstances, we cannot assume that the trial court was wrong in stating that the figure (loss of earnings) exceeded $60,000.00.
>
> "It thus appears that the jury must be held to have awarded some $40,000 for the non-pecu-

> niary damage. With respect to that award the members of this Court as now constituted are in agreement, as was the Court on the former hearing on two preliminary conclusions.
>
> "The first of these is that the verdict was too high."

The Court then went on to review its power to reduce the verdict. The majority found there was no power to do so in the circumstances of that case. Chief Justice Denman, Justice Stephens and Justice Mathews dissenting.

There is no question in the present case of what the Court can do about it, should it conclude the judgment is excessive, since this is an appeal in admiralty. The United States Supreme Court passed on this question in *Brooklyn Eastern District Terminal v. United States* (1932), 287 U.S. 170, 53 S. Ct. 103, 77 L.ed. 240. The Court said:

> "In admiralty an appeal to the Court of Appeals is deemed to be a trial de novo (citing cases). An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact."

In Chief Justice Denman's dissenting opinion in *Southern Pacific Co. v. Guthrie* (supra), in discussing the award of $40,000 for pain and suffering for the loss of a leg below the knee, he stated, at page 933:

> "That the amount is substantially more than appellant should pay we are agreed. * * * To me it seems no exaggeration to apply the term 'monstrous' to such a concept of American justice."

The pain and suffering which Guthrie suffered in the cited case, as a result of a train amputating his right leg below the knee, was described by the Court in the earlier hearing as follows (180 F. (2d) 295 at page 303):

> "The evidence as to these factors was that Guthrie was hospitalized for 37 days during which he underwent two operations on his stump. In the process of healing a 27 degree contracture of the right thigh developed, so that the stump of his leg extended at an angle which up to the time of trial had prevented him from wearing an artificial limb, and it appeared possible that he would never be able to wear one. He suffered from phantom pain in the cut limb, there was tenderness over the cut end of the sciatic nerve, and the medical testimony was that this phantom pain, a continued constant burning sensation as if he felt his amputated foot, was characteristic of amputees generally, and was real pain, often remaining constant and permanent. Loss of the leg has increased his discomfort in his back, due to a congenital anomaly which previously existed there.
>
> "It is common knowledge that for a man of Guthrie's age, aches and pains arising out of physical disabilities do not ordinarily lessen, as they might for a younger man. We do not think it necessary to determine whether the probability of future suffering was proven with the requisite degree of certainty. On the whole, the inconvenience, the disfigurement, and certainly some degree of distress are shown to be both substantial and permanent."

Although Mr. Luehr suffered severe injuries, it cannot be said that his pain and suffering was greater than that of Guthrie, or that his future pain and suffering will be greater than that anticipated by Guthrie. Mr. Luehr has all his limbs and the doctors testified that he can look forward to continued recovery from the pains of his fractures. Mr. Guthrie's leg, on the other hand, was gone forever.

It is respectfully submitted that an award which necessarily contemplates some $85,000 to $90,000 for pain and suffering is excessive. This Court, sitting in admiralty, should "review de novo, all the evidence on merits and on damages and render the decree it considers the District Court should have rendered". (Robinson on Admiralty, 1939 Ed., page 26.) *Brooklyn Eastern District Terminal v. U. S.* (supra).

SUMMARY OF POINTS ON DAMAGE.

The judgment should be reduced to a more reasonable figure in accordance with the immediately previous section of this brief.

In addition, a reduction should be made for the contributory negligence of Mr. Luehr in unnecessarily exposing himself to a position of danger beneath a suspended load in violation of the terms of the Pacific Coast Marine Safety Code promulgated for his protection. This contributory negligence is discussed at length in a previous portion of this brief. In addition to bringing the hold-harmless

agreement between the Government and Jones into operation, it operates to mitigate the damages. *American Stevedores v. Porello,* 330 U.S. 446, 458, 67 S. Ct. 847, 91 L. Ed. 1011.

To the ultimate award, there should then be credited the sum of $10,404.52 already paid by his employer as compensation and medical expenses. This credit should be given any award against the United States by virtue of the employer's waiver of subrogation against the United States. *Palardy v. U.S.,* 102 F. Supp. 534 (supra). This has already been fully explained in earlier portions of this brief. Upon a finding that the United States is entitled to indemnity from Jones, the amount already paid by Jones should, of course, be credited to the award, since Jones cannot be required to pay these special damages twice.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the amount of the award should be substantially reduced, the payments already made by way of compensation and medical expenses be credited to the award, the decree dismissing Jones Stevedoring Company should be reversed, and the United States be granted full indemnity from Jones Stevedoring Company by virtue of the terms of the express contract whereby Jones agreed to hold the United States harmless for any loss arising from a personal injury "*occasioned, either in whole or in part* by the

negligence'' of Jones, ''its officers, agents, or employees''.

Dated, San Francisco, California,
March 6, 1953.

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No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE JONES STEVEDORING COMPANY.

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STATEMENT OF PLEADINGS AND JURISDICTION.

This appeal in Admiralty by the United States of America (hereinafter referred to as "the Government") concerns a final decree (R 72) entered on April 10, 1952 against the Government and in favor of the appellee Frank Luehr, and from a final decree (R 70) entered on April 11, 1952 dismissing appellee Jones Stevedoring Company (hereinafter called "Jones").

By way of an amended libel (R 3) under the Public Vessels Act of 1925 (46 USC 781, et seq.) the ap-

pellee Luehr charged the Government with liability for injuries suffered by him while he was employed as a longshoreman by Jones, aboard the USNS "SHAWNEE TRAIL", a public vessel owned and operated by the Government, as the result of the conceded negligence of an employee of the Government. The Government by way of a petition (R 13) under Admiralty Rule 56 sought recovery-over against Jones, who by answer (R 18) denied all liability to the Government and all liability to Luehr excepting that which it had assumed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901-950. Jones in its answer also alleged that the United States District Court was without jurisdiction to entertain the said petition or to assess any liability against Jones.

STATEMENT OF THE CASE.

Inasmuch as the Government in its Statement of the Case has set forth a highly selected version of the evidence and has omitted significant facts based on the overwhelming evidence presented at the trial before the District Court, it becomes necessary on the part of appellee Jones to submit this statement of the case.

On July 28, 1950 appellee Frank Luehr was employed by Jones Stevedoring Company as a longshoreman, together with other stevedores, to assist in loading certain jet plane fuselages from an Army barge, which was owned, operated, managed and controlled

by the Government, to what is called the mechano deck, a superstructure built of adjustable steel I-beams above the main deck of the USNS "SHAWNEE TRAIL", a Navy tanker built and owned by, and operated for the Government. The planes were being transferred from the barge to the "SHAWNEE TRAIL" by the use of a large floating crane, or what is commonly referred to as a heavy lift barge, which was tied between the "SHAWNEE TRAIL" and the Army barge. The said heavy lift barge was likewise owned, operated, managed and controlled by the Government. Said vessels at the time of accident were docked at "Naval-In-Transit Dock No. 3" in navigable waters at Alameda, California.

The operation of picking up the plane from the Army barge by use of the derrick or crane of the heavy lift barge was directed exclusively by the "whistleman", an employee of the Government, who was in charge of the said heavy lift barge. The only thing the stevedores did in this connection was to affix the bridle to the plane and secure so-called "tag lines" to the fuselage for the purpose of steadying it while it was being moved high over the deck superstructure of the vessel. Neither Luehr nor any other employee of Jones had anything whatsoever to do in the moving of the plane from the barge to the vessel (R 97).

The crane operator, a Government employee, operated the controls of the crane and took orders only from his foreman, the whistleman, another Government employee (R 98).

At the time of the accident, about 11:30 A.M. after about eleven other planes had been so moved (R 215), a plane had been lifted from the barge and had been carried over to the mechano deck of the "SHAWNEE TRAIL" by employees of the Government as described above. The plane at that time was in a position *approximately* over the point at which it was to be stowed and secured on the mechano deck. It had been lowered by the crane to a position within reach of the stevedores, 2-3 feet from the final place of rest on the mechano deck (R 218-219). The plane was spotted in accordance with a loading plan previously prepared by Mr. Rosenstock, the Government's representative in charge of the operation, who was present on the catwalk adjacent to the mechano deck (R 108).

The customary method of doing this work and the means by which it was performed before and at the time of the accident was as follows: After the plane has been moved and lowered by Government employees to the *approximate* position where it was to be secured to the mechano deck, adjustable beams of the mechano deck are moved when necessary into *exact* position in order that wooden platforms can be placed as required for the purpose of securing the landing struts of the plane on the *precise* spot directed by the Government's representative.

The tag lines are used only while the plane is being moved high over the superstructure. When it is lowered down to *approximately* where it is to be landed and is within reach of the men, the tag lines are of

no more use and are let go (R 113). The men then take hold of the landing gear with their hands to keep and maintain control of the plane until it is actually landed in the *exact* position over and upon the three platforms (R 113-114).

At the moment of the accident Luehr was necessarily and properly holding the left rear strut stand, or landing gear, of the plane for the purpose of steadying and guiding it into the exact position on the platform (R 625-626). Rosenstock, the Government's representative in charge of the operation, and Spirz, Jones' foreman, decided it was necessary to move the plane "a little aft". Luehr at that point, and in the process of helping to steady and preparing to guide the plane into its proper position was then and there where his job required him to be and he was doing exactly what was necessitated by his particular duties (R 114-115). It was at this moment that the crane operator (Government employee) negligently caught his sleeve onto a lever control which suddenly and without warning caused the plane to drop and severely injure Luehr (R 115-116). The crane operator shortly after this accident admitted that he had made a mistake and that the accident was his fault (R 119).

The stevedoring contract, the basis upon which the Government claims recoupment from Jones (Government's Exhibit B) simply provides that Jones shall be liable-over to the Government only if the injury was occasioned in whole or in part by the negligence of Jones. But this provision is specifically

limited by the stipulation that Jones "shall not be responsible to the Government for and does not agree to hold the Government harmless if the damage, injury or death resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents or employees" of Jones with specific directions of the Government representative (Art. 14(b)(2) of Government's Exhibit B).

QUESTIONS PRESENTED.

(1) Should this Court properly grant a trial *de novo* so as to reconsider the overwhelming evidence against the Government's contentions?

(2) Where all the substantial and heavily preponderant evidence has established that the accident was solely and proximately caused by the negligent act of an employee of the Government, can the Court grant recoupment against a third party whose employee was injured while properly performing work at the precise place and in the exact manner that was required by the nature of the job and his calling?

SUMMARY OF THE ARGUMENT.

(1) The sole proximate cause of the accident was the admitted negligence of the crane operator, an employee of the Government, in causing the plane suddenly and without warning to drop and injure Luehr

as he was attempting to steady and guide the plane into position.

(2) There was no negligence whatsoever on the part of Jones or its employees proximately causing, or in any degree contributing, to the happening of the accident; Luehr was in a proper position and doing precisely what his job required him to do when the plane was caused by the negligence of the Government's employee to suddenly and without warning drop upon and injure him.

(3) The findings of fact and conclusions of law are fully supported by substantial and overwhelming evidence and should not be disturbed on appeal.

(4) The Government's appeal from the trial Court's decrees is nothing more than an obvious attempt to have the case heard *de novo*. Since 24 of 25 witnesses gave oral testimony in Court and inasmuch as the determination of the case turned solely on issues of fact, not law, the trial Court's decision, which is fully supported by substantial evidence, should not be reviewed.

(5) The stevedoring contract plainly provides that Jones shall not be liable to the Government for loss or damage resulting solely from an act or omission of the Government or its employees, which is the certain fact so conclusively established by the evidence in this case.

THE ARGUMENT.

I.

THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS THE CONFESSED NEGLIGENCE OF THE GOVERNMENT'S EMPLOYEE IN TRIPPING THE RELEASE LEVER OF THE CRANE WITHOUT WARNING, THEREBY CAUSING THE PLANE TO DROP UPON AND INJURE APPELLEE LUEHR, AND THERE WAS NO FAULT ON THE PART OF LUEHR OR APPELLEE JONES.

(a) It was necessary and proper that Luehr be in the position he was and doing the work he was doing when the plane was negligently dropped upon him by the Government's employee.

It is conceded by all parties that the crane operator Cecil Bailey, who was an employee of the Government, carelessly and negligently tripped the release lever of the crane causing the plane suddenly and without warning to drop "as though the line was cut" (R. 341), thusly causing severe injuries to Luehr. Bailey's testimony by way of deposition (and he was the only witness whose testimony was not given in open Court) clearly establishes that the accident was caused by his negligence.

Bailey said:

> "* * * I pulled the friction in in order to hold the load and as I proceeded to boom down I looked out the window to get a better look to see that the boom was away from the gear, that is, the ship's gear, the stays and what have you; and as I reached out the window, I had a pair of coveralls—I was working down below oiling the engines—and the sleeve of the coverall caught on the friction and I pulled the friction forward; and as it done that, the plane dropped the distance of two and a half to three feet. * * *" (R. 219).

The Government argues in its brief (p. 15) that there were "two primary reasons for the injury to Mr. Luehr: (1) The plane fell, and (2) Mr. Luehr was under the plane". And, that: "In the absence of either of these factors, there would have been no injury to Mr. Luehr". The same simple observation can be made as to every accident arising from negligence in which someone is injured: a negligent act or omission and the presence of the injured person.

It is conceded by the Government in its curious theory that "the first cause is attributable to the negligence of the derrick operator" but that "the question then remains as to whether or not Mr. Luehr's presence under the plane involved negligence on his part, or on the part of any other employee of Jones" (Gov't Brief p. 15).

Simplified, the Government's whole argument hinges upon the question of whether or not Luehr was properly where he should have been, doing what he should have been doing in accordance with the requirements of his job at the time the plane was caused to fall upon him by the admitted negligence of the Government's employee.

The evidence presented to the Trial Court is so preponderately and convincingly against the Government's contention that we are constrained to doubt that anyone could reasonably expect an Appellate Court to give serious consideration to such a tenuous argument.

At the time of the accident Mr. Spirz was the walking boss in charge of Luehr and the other long-

shoremen employed by Jones. He was examined and cross-examined at great length; and we say without fear of contradiction that he was a most intelligent, truthful and impressive witness. He described how his men necessarily assisted by means of "tag lines" in helping to steady the plane from swinging and to prevent it from hitting any of the ship's superstructure or gear while it was being taken across the deck of the ship high above, some 35 or 40 feet. In this operation the whistleman in charge of the crane operator (both being Government employees), would then give a signal to the crane operator to lower the plane down to the point where it would be within reach of the stevedores, at which time the tag lines would be of no further use and would be dispensed with. Upon discarding the tag lines, it would become necessary for the men to take hold of the plane by hand for the purpose of steadying it to prevent damage to the plane (R 107-113-340-341). The Government's loading representative who was in charge of the job (R 172) directed the spot where the plane was to be landed according to a plan previously prepared by him (R 108-109). Wooden platforms were placed under the stands or tripods affixed to the landing gear (the wheels of the plane having previously been removed). Mr. Spirz's testimony describes graphically the manner in which this was accomplished.

> "Q. Could you describe to the Judge just what you do with them (loading platforms).
>
> A. Well, you should have three, because you have three landing wheels, have one for the nose, up in here (indicating) there is a beam that is

stationary that stays here and one stays here (indicating).

Q. Then that would be parallel to the catwalk?

A. Fore and aft. That is for the nose and wheel stand, we have one there and then we have two others for the rear two wheels, and on Mr. Rosenstock's plan he gives an idea just where those wheels will be.

The Court. Those are adjustable? Are they adjustable or when are they put on there?

The Witness. I don't understand.

Q. (By Mr. Resner.) The Court says when are they put on?

The Court. When you are lowering the plane?

The Witness. The stand on the—no, these platforms are put on these movable beams.

The Court. Yes.

The Witness. And when the plane is in the right place.

The Court. Yes.

The Witness. Then if the stand of the wheel is here we move the platform over.

The Court. They are adjustable?

The Witness. Yes, they are just a regular stand two men can handle.

The Court. All right.

The Witness. You can move it back and forth.

Q. (By Mr. Resner.) And all the beams also adjustable so that they are moved to receive the planes in the proper place?

A. Oh, yes, just like this shows, that is just how they are. You can move them back and forth, but if you kick one harder than the other you have to straighten it out, and they are movable. Now, the object is, you have to try and

get as close as you can before the plane comes aboard the ship where this platform should be. *So we get the plane where we can handle it and we move it to where we want it.* Then everything stops and we see where our platforms are. *If they aren't right we get under the plane and we have to move these movable beams just right—we have to put this platform exactly under that stand of the wheel.* We have to be careful because we have to drill a hole on this, outside of the beam, and another one on the inside, and on this side also, so after the plane is landed we have a carpenter come alongside that will drill a hole and put a U-bolt." (R 109-111.) (Emphasis supplied.)

Mr. Spirz testified further as follows:

"Q. And there are certain men required to to work on the mechano structure?

A. No, it is not necessary for certain men, it is just wherever they are at. If a man is on the mechano deck and the plane is being hoisted, he automatically will stop what he is doing and come over and be ready for the airplane.

Q. What I had in mind, does this operation entail some men working on the deck and some men up on top of the structure?

A. That is correct.

Q. What is the job of the men on top of structure, that is, on the beams?

A. Their job is to take care of the tag lines, if they have any tag lines when the plane gets within reach and it is stopped, their job is to hold on to the plane to keep it from swinging, moving, just to steady it." (R 112.)

* * * * * * *

"The Witness. Yes. And we have to keep those lines, tag lines, taut so the plane doesn't swing into anything.

Q. Are those tag lines also used when the plane is brought down when he gets above the spot where you are going to land it?

A. They are then of no more use.

Q. You do use it for awhile and the plane comes down?

A. While it comes down until the plane is within reach.

Q. When the plane is within reach, then what happens?

A. Then the tag lines are forgotten, either the men will go to the wheel and he will take the tag line off and just let it go, and hang onto the wheel structure.

Q. Now, does this operation require the men to get their hands upon the plane physically?

A. When the plane is down close to the mechano deck and they can reach the landing gear, then that is what they do, they go over and grab ahold of the landing gear to keep control of the plane.

Q. And they do that for what purpose, Mr. Spirz?

A. So the plane will not swing and hit anything.

Q. And so that you can land it——

A. You have to hold on to it to land it exactly on this platform.

Q. On the platforms?

A. Yes, sir.

Q. Now, is the plane stopped at some point before the men take over with their hands?

A. Well, it is up 30 feet, the operator might stop it three or four times, or he might have it come all the way down until it is up to us to grab hold of it.

Q. And then is it stopped at that point before the men grab hold of it?

A. Oh, yes.

Q. Now, did you see Mr. Luehr right before this accident?

A. Well, yes, when I was standing here (indicating).

Q. You said here, on the catwalk, you have indicated on the catwalk?

A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and we waited for the plane to come down, and *when the plane stopped and we were ready to take over and hold onto it,* I saw Mr. Luehr coming over and grab hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.

Q. *Was he in a place where he was supposed to be, Mr. Spirz?*

A. *Yes.*

Q. *That was his job there?*

A. *That is his job, to hold onto the plane and steady it.*

Q. Was he doing what he was required to do at that particular time?

A. That is correct." (R 113-115.) (Emphasis supplied.)

The Government's own witness Mr. Lehmkuhl admitted that at some point in the operation it is neces-

sary for the men to physically take hold of the airplane to bring it to its final resting place:

"Q. After it gets to that point, a man certainly gets up to the tripod to see it is landed exactly where it is supposed to be, is that right?

A. After it is to within practically the permanent setting place of the airplane, yes, sir.

Q. And he is right there on the platform, is that right?

A. When the tripod is centered on the platform and in its *approximate* final resting place, the people go in and steady it by actually physically taking hold of the airplane.

The Court. At that time is he physically under the plane?

A. Yes." (R 596.) (Emphasis supplied.)

Counsel for the Government further contends that all Luehr needed to do was to stand back from the plane and hold onto the wing, that it was not necessary to take hold of the tripod underneath the wing. The following testimony by Spirz completely destroyed that contention:

"Q. (By counsel for the Govt.) At this particular moment when the plane dropped he (Luehr) was steadying the plane?

A. That is correct. He was standing on a ten inch beam and he had his hands on the tripod steadying the plane.

Q. On the tripod of the plane?

A. The landing gear, the stand, the tripod.

Q. He was entirely under the wing of the plane?

A. Partially under that tripod, that landing gear is underneath the wing so far. That is why you are under the plane to steady that plane, *you have to get in there.* When you get in there and grab hold of your landing gear, the wing's above you, over you, you're underneath.

Mr. Resner. When the witness said so far, he indicated with his hands a distance of one and a half feet.

Q. (By Mr. Harrison.) *Is it not possible to steady the plane by putting the hands on the wing?*

A. *The wing is too high.*

Q. Is it not possible to lower the plane down lower?

A. Then you have your tripod and stand in between here, liable to damage your landing gear (indicating).

* * * * * * *

Q. And you say that the man standing there could not reach the wing that is only five feet above, the landing gear five feet?

A. *Yes, he could reach it, but he couldn't steady it. There is nothing to hold the plane, I mean."* (R 154-155.)

Mr. Harrison tried in vain to suggest that Luehr could have steadied the plane by holding onto the edge of the wing, but the testimony of Spirz and many other witnesses completely exploded such a claim:

"Q. That would be about shoulder height?

A. The leading-trailing edge of the wing?

Q. Yes.

A. It is a little higher than that, and *no place to grab. You can't—you can shove it, and there*

is a sharp point in the trailing edge, but you can't hold. If the plane wants to go that way, the wing won't do you any good, won't hold the plane. The tag lines are of no use when it gets down that far.

Q. Why not?

A. Because the tag lines are gone when you get, reach the object, and you see that tag line, you see that man over there, see what he is doing, you can see that man over there and they are working with the plane. The wing is swinging, the three men—you see what is happening, *but when the plane comes down there is no vision here, he can't see that man, he can see his feet, but you can't see what he is doing with the hands. That is why you discard your tag lines when the plane comes within reach and you can grab that stand on the landing gear. Then your tag line is of no more use to you.*" (R 156.) (Emphasis supplied.)

Timothy O'Brien, who after World War II became Deputy Attorney General in the Attorney General's Office in Sacramento, testified that during the war he was assigned to the Pacific Overseas Air Service Command at Oakland, California and that in that capacity he handled all Air Force loadings for various destinations and that he had considerable experience in loading planes on mechano decks (R 663-664).

Mr. O'Brien's testimony regarding the customary and proper manner of loading planes on mechano decks corroborates the testimony of Spirz and the other witnesses:

"A. Now, the mechano deck had a certain problem in that we never had everything in exact

position as to—so that the platforms to which the airplane was being loaded would exactly coordinate with the part of the airplane we had to get on the platform, namely, your landing gear assemblies. When it came down to a certain point, generally it was high enough so you could walk in under the aircraft while working on these irons which makes up the mechano deck.

Then you would go underneath, line it up, and then bring it down. There were two reasons you had to go under, one was to line it up so they are square on the platform, and secondly, the tripods weren't perfectly balanced, so that if you didn't exactly set them in line as you dropped it onto the deck, the natural result it would come up with a little angle one way or the other. But that is substantially the procedure the stevedores did, they did go in under the aircraft, grabbed the landing gear guided her into the final position, and then dropped her on the deck, meaning onto the prepared platform, making sure the tripod was absolutely flat.

Q. Now let me ask you, Mr. O'Brien, assuming that the plane wasn't just over that platform, as you mentioned, you can't get them, just off, say it is off a foot or so off to the side of it, and it has been stopped by the whistleman at a height allowing the men to hold onto the plane, or the strut or gear, now, will you state whether or not in the course of that operation it would be necessary to have men to get hold of the plane at that point?

A. It would be, because *the aircraft was never allowed to swing free once it came in any area where it could come in contact with an obstruction; of course, the best thing to hang onto under*

> *those circumstances would be the struts and the other—well, that would be the only thing underneath you could have grabbed.*" (R 667-668.) (Emphasis supplied.)

There is no conflict in the record with respect to the fact that the plane had been lowered to within two to two and one-half or three feet from the level of the mechano deck at which point it was stopped. The Government's crane operator so testified (R 218-219). At that point the Government man in charge, Mr. Rosenstock, and Spirz agreed that the plane had to be moved over "a little bit aft toward the house" (R. 115).

It was Luehr's job to take hold of one of the struts or tripods and to steady the plane at this point so the plane wouldn't hit any part of the ship and to be prepared to help guide it into its final resting place on the deck (R 112, 130, 340, 518, 611, 612, 636, 651, 652, 667, 668).

This is precisely what Luehr was doing and was employed to do at the time of the accident. As Spirz testified: "There is no other way." (R 132).

Luehr himself testified that when he took hold of the strut the next succeeding step was to have helped guide it down to the platform. As stated above, the plane had to be moved aft only "a little bit":

> "Q. (By Mr. Kay) Mr. Luehr, after this plane came over and was put in this position where it was held still, at which time you went over there and took hold of the strut with your

left hand and a hold of the fuselage with your right hand, the next succeeding operation that you were going to do was to push that and have that go down and land on that platform that is on this mechano deck; is that correct?

A. That is correct." (R 349).

(b) The accident was neither caused nor in any degree contributed to by the violation of any safety rule on the part of either appellee.

The Government, in grasping at straws, urges the wholly unsupported claim that Luehr, at the time of the accident, was in a position in violation of two safety rules contained in the "Pacific Coast Marine Safety Code" (Government's Exhibit A). As will hereinafter be shown Rule 901 which prohibits the suspending of "sling loads" over the heads of workmen is not applicable to the loading of planes.

The Government also particularly relies on Rule 911 of that code, likewise not applicable for the same reason, which reads as follows:

> "When assisting to steady in hoisting or landing a *sling load,* longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object and shall always face the load. *Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing."* (Emphasis supplied).

As we shall hereinafter demonstrate, these two rules do not apply to the operation of loading an airplane onto a mechano deck. Nevertheless, reading the two rules in the light of what may be considered

in certain cases would be good practice, will this Honorable Court please note that Safety Rule 911, upon which the Government relies so heavily, specifically authorizes longshoremen "to take hold" of loads for "steadying or landing" when "lowered to shoulder height".

We have already conclusively proven that this load was stopped 2 to 3 feet above the mechano deck before Luehr approached it. Not even the Government can contend with any degree of sincerity that 2 or 3 feet is more than "shoulder height".

That Luehr was not under a suspended "sling load" nor "in the line of travel of the load, nor between the load and any nearby fixed object" is abundantly made clear by practically all of the testimony heard by the trial Court.

In this connection Spirz testified that while the plane is above reach of the men they are not to go under it. "Tag lines" are used at this point:

> "Q. Would you say it was proper to allow a man to stand under a suspended load ten feet above his head?
>
> A. No, because he couldn't control the airplane, he couldn't reach it. If he can reach, when he can reach the plane, then it is permissible to get under it.
>
> Q. Now, when it reaches the uppermost part of your reach, is it proper for him to stand underneath the load to help steady it?
>
> A. Well, he doesn't go underneath the load, then *when it gets within a reasonable reach, where he can go out and reach that landing gear*

or that tripod, then he has to go underneath that ring and he is partially under the plane. Yes, he has to do that." (R 124-125.) (Emphasis supplied.)

Mr. Spirz added that "* * * *you can't land that plane unless you get under it."* (R 125).

All of the above testimony came out on cross-examination by Mr. Harrison, counsel for the Government. Mr. Harrison persisted in trying to establish that this was dangerous practice, which brought from the Court this logical observation:

> "The Court. He has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous." (R 126).

Mr. Spirz further explained that it was necessary for the men to hold the plane with their hands to "steady it from swinging" (R 130) and that "you have to get under it * * * there is no other way. You have to get underneath the plane to hold the tripod to land it." (R 132).

The trial Court had good reason to believe Spirz when he testified: *"I took all the safety precautionary measures that were possible at that time."* (R 150.) (Emphasis supplied.)

That there was no violation of any safety rule as claimed by the Government was most effectively developed during the cross-examination of Mr. Spirz on this point in the following testimony:

"Q. Is it true, Mr. Spirz, that the Pacific Coast Marine Safety Code has some specific provision which requires men shall not stand underneath a suspended load?

A. There is a rule in that book that states that. And if you have—we will take an example, a load of canned goods or a sling load of sacked sugar or coffee, that load is only probably four feet wide at the most and five feet long, and the smallest hatch on a ship—the square of the hatch, like a Liberty No. 3 hatch is twenty feet—a square of twenty feet. A man can stand in the square of that hatch and not be under the load.

An airplane with a wing spread of 35 or 40 feet and with the landing gear underneath the wings and the tripod stand underneath the wings—three landing gears under the wing, the wing is above—that is not a proper place to hold onto an airplane. *The most logical place for any stevedore to hold onto an airplane is that landing gear, that tripod, and that is the lowest part of the airplane* * * *" (R 163.) (Emphasis supplied.)

And:

"A. *We can't get away from being under that plane. It is that low. A man holding to a sling load of canned goods or coffee, it isn't necessary. You don't have to.*" (R 164.) (Emphasis supplied.)

The complete answer to the Government's assertion that Luehr was in "the line of travel" or "between the load and any fixed object" allegedly contrary to Rule 911 of the Safety Code is that at the time of the accident the plane was to have been moved "a

little aft" and away from Mr. Luehr who was facing the load in exact compliance with the code.

"Q. Which direction did you intend it to go? Which direction did you and Mr. Rosenstock want it to go?

A. Aft and inshore.

Q. Was that——

A. (Interposing) I mean aft and offshore. That would be aft and towards the midships.

Q. Was that toward Mr. Luehr or away from Mr. Luehr?

A. That would be, where Mr. Luehr was standing, it *would be going away from him.*

Q. *Away from Mr. Luehr?*

A. *Yes.*" (R 162-163.) (Emphasis supplied.)

As stated above, this very section of the Safety Code on which the Government curiously relies, even though it has no reference to loading planes, provides for and contemplates precisely what Luehr was doing insofar as he was "assisting to steady" the plane. The last sentence of the rule specifies: "Drafts should be lowered to shoulder height before longshoremen take hold of them for "*steadying* or landing".

We reiterate that the testimony conclusively shows that Luehr waited until the plane was stopped at a position "shoulder height" before he took hold of the tripod for the purpose of "steadying" and "landing" the plane.

Mr. Harrison, counsel for the Government, unwittingly, but aptly, expressed the true situation when he advised the Court: "* * * the only guiding neces-

sary at that time to get it over the platform is to stop it from swinging itself and *to guide it a little bit as it approaches the platform.*" (R 624.) (Emphasis supplied.)

While the Government has contended throughout the trial of the case that there was an exact point at which a man would be justified in physically holding onto the plane, the testimony of nearly every witness, as we have shown, was to the effect that Luehr was strictly in the position where the job required him to be and doing exactly the thing that his job required him to do at the time of his accident.

(c) The Safety Rules referred to by the Government concerning "sling loads" are not in fact applicable to operations involving the loading of planes.

It is our contention that Safety Rules 901 and 911 discussed above are not in fact applicable to the operation of loading a jet plane, in that it was never within the contemplation of the promulgators of the Safety Code that "sling loads" would have any reference to "heavy lifts" or loads such as a plane fuselage. Nonetheless, as have heretofore shown, the spirit of those particular rules was complied with.

Timothy O'Brien, previously referred to, testified in this connection as follows:

> "Q. I will ask you this, Mr. O'Brien: Is a plane load such as the plane here that would be coming down to the mechano deck, that is, that plane coming over, would you call that a sling load?

A. No, I had understood it was a lift load. To me a sling load contemplates a duckboard, pallet board, something of that sort, which is a different type of operation." (R 669.)

Safety expert Stanley C. Davis, who was the technical advisor when the rules were promulgated, testified as follows:

"Q. Can you tell us whether an airplane attached to a line can be lowered on a mechano deck is a sling load?

A. No, sir." (R 681.)

* * * * * * *

Q. "You have testified that you would not term a plane suspended on a cargo fall a sling load?

A. Yes, sir." (R 690-691.)

The testimony of Mr. Davis on the question of the proper interpretation of the Pacific Coast Maritime Safety Code is most significant in that Mr. Davis was the safety supervisor for the Maritime Association of the Pacific Coast for a period of over 22 years, having been with that organization since its inception. He was fully familiar with the operation of loading jet planes on mechano decks (R 679). Mr. Davis explained that "skeleton decks" as set forth in the Safety Code are entirely different from "mechano decks" and that the safety rules relied upon by the Government are not applicable to situations such as loading planes on mechano decks (R 679-684).

With respect to Rule 901 of the Safety Code which provides that a "sling load shall not be put or sus-

pended over the men's heads" and Rule 911 which has reference to "loading a sling load", Mr. Davis explained that these rules did not in fact apply to a situation involving the loading of planes upon mechano decks:

"Q. Well, the point I am trying to make is this, Mr. Davis. The rule says, I will read only the pertinent part of it, Mr. Kay, the rule which I feel pertinent:

'When assisting to steady in hoisting or landing a sling load, longshoremen shall not stand in the line of travel of the load nor between the load and any nearby fixed object,' and the load, I assume.

Now, would you say that that portion of the rule would apply equally well to a lift?

A. No, I wouldn't.

Q. Why not?

A. Because only lifts—it becomes necessary in various operations for the men to walk in and grasp that load in order to steer it and of course walk it into position where it is going to be landed.

Q. Yes. Is it ever necessary for a man to walk—it says that, the remainder of the rule says:

'Drafts should be lowered to shoulder height before longshoremen take hold of them for steadying or landing.'

Now, is it your testimony that that rule does not apply to a lift?

A. That would apply to a lift or anything, because they would naturally stay out from under it until it came to shoulder height, and when it

gets to shoulder height it becomes necessary for them to control the load.

Q. Now, isn't it true that the reason that they require it to come to shoulder height is so that the men can steady by putting their hands out directly in front of them?

A. Yes.

Q. The rule requires them to come down to shoulder height so the men won't have to reach under there and consequently be under it (indicating)?

A. May I say that rule pertains generally to the handling of loads in a hatch, and when you are loading cargo and a load will come in, and then the longshoremen in a hold will take the cargo from the board or scow and stow it in the ship and while they are doing that they may start to bring another load in, and that pertains to the fact that they shall stand clear of that load, and there is a rule there that calls for them to hold that load until men in the hold are ready for it, and they can get in the clear and not be in line of travel.

Q. I understand. And you say that the rule does not apply to deckloads at all?

A. Now, deckloads, you are giving that a lot of territory.

Q. You took in a lot of territory, you said the rule applied mainly to loading in the hold; does it apply to loading——

A. May I answer the question this way: That the men will stand clear until the whistleman has landed or spotted that load *as near as possible over the point where he intends to land it permanently.*

Q. I see.

A. *Then it becomes necessary for the men to go under or near that lift.*" (R 691-693.) (Emphasis supplied.)

II.

THE ALLEGED VIOLATION OF SAFETY RULES BY APPELLEE JONES WOULD IN NO EVENT CONSTITUTE NEGLIGENCE PER SE BUT WHETHER THERE WAS ANY NEGLIGENCE WOULD SIMPLY BE A QUESTION OF FACT WHICH THE TRIAL COURT IN THIS CASE DETERMINED ADVERSELY AS TO APPELLANT.

A recent case involving this specific point was decided by the California Supreme Court on April 4, 1950 in the matter of *Powell v. Pacific Electric Railway Co.* (35 C. 2d 40, 216 P. 2d 448). Defendant's motorman had violated a company operating rule which required that motormen reduce their speed a sufficient distance in advance of a highway crossing so that the train would be allowed to coast on its approach "to enable full braking power being obtained in emergencies". Upon appeal from a judgment in favor of the defendant, the Court held:

> "Clearly it was for the jury to determine as *a question of fact* whether the motorman acted as a man of ordinary prudence under the circumstances in the operation of his train when he first saw the truck on the right of way and assumed its probable procedure. (Peri v. Los Angeles Junction Ry. Co., supra, 22 Cal. 2d 111, 120, and cases there cited.)

> "Nor does respondent's above-noted operating rule avail appellants in establishing their right to recover because of the happening of the fatal accident." (Page 46.) (Emphasis supplied.)

The Court went on to hold that the rules were properly admitted in evidence "as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings" (Page 46). It was pointed out, however, that this would be a circumstance for the jury to consider on the issue of respondent's negligence, but that clearly *"a violation of such rule would not constitute negligence per se"* (Page 46.) (Emphasis supplied.)

The jury had been instructed that as to the legal effect of the company's rule

> "* * * that while 'not the law', a 'breach of duty' might be implied from a finding of violation of the rule. Neither was it 'misleading' nor did it effect a conflict for the court to give the further charge that the motorman would not be guilty of negligence in the operation of the train if the jury found that he 'used the same degree of care that any prudent person would have used under the same or similar circumstances.' Since respondent's rule was 'not the law' but only a factor to be considered in the jury's evaluation of the motorman's conduct as a factual issue (*Simon v. City and County of San Francisco,* 79 Cal. App. 2d 590, 598), the standard of care that he was bound to exercise remained 'that of the man of ordinary prudence under the circumstances.' (Peri v. Los Angeles Junction Ry. Co., supra, 22 Cal. 2d 111, 120.)"

In *Simon v. City and County of San Francisco,* 79 Cal. App. (2d) 590, 598, the Court clearly stated the law to be that while company safety rules were admissible "it was a question of fact for the jury and not a question of law for the court to determine whether the conduct of the motorman, under the circumstances, constituted negligence".

As the District Court in the case at bar so aptly observed, the question of the application of the safety rules to the facts and whether or not there was any question of negligence was a matter for the Court to determine from the facts presented:

> "The Court. Well, to say that you may or may not get under a load under certain conditions, you will have to be guided by the facts and the testimony from this record. Under the conditions existing I can see how he can get under this plane and get under these others——
>
> Mr. Harrison. Well, if your Honor please——
>
> The Court. I think you are entitled to read the rules if they have any application; I will have to make the determination on the facts proved." (R 578-579.)

The trial Court, upon hearing the many witnesses presented and after carefully evaluating their testimony, determined that there was no violation of any safety rules and that there was no negligence on the part of appellee Jones or any of its employees.

III.

THE GOVERNMENT'S FAILURE TO CALL ITS EMPLOYEE AND KEY WITNESS WHO HAD CHARGE OF THE CRANE OPERATIONS RAISES A PRESUMPTION THAT HIS TESTIMONY WOULD BE UNFAVORABLE.

A most significant development took place during the trial of this case when counsel for the Government at first indicated he would be agreeable to submitting both the deposition of Bailey, the crane operator, and Cates, the Government employee in charge of the crane operations "in the record" (R 196):

> "Mr. Resner. May I ask if there is a deposition available for Cecil Bailey and Charles Cates? tion available for Cecil Bailey and Charles Cates?"
>
> * * * * * * *
>
> "Mr. Harrison. We might suggest for the record that we don't feel there is any necessity for reading the depositions. Of course the libelant is entitled to do so, but *we would be agreeable to just submitting the depositions in the record.*
>
> The Court. You don't know my practice here. I want it to register now as we go along. It may be of assistance to me in the matter. I will have to read them if you gentlemen don't, so I will give you the burden of reading them.
>
> Mr. Resner. If your Honor please, I might tell you that on June 29, 1951—last year—we took the deposition of these two men, Cecil Bailey and Charles Cates. Cecil Bailey was the man who was operating the crane which dropped the plane, and Charles Cates was the whistleman who stood on the catwalk and gave the signal. He is the man, Charley, Mr. Spirz referred to.

> These men were both employees of the army at the time of the accident, and the appearances at that time were the same as the appearances in at Court before your Honor insofar as counsel are concerned * * *'' (R 196-197.) (Emphasis supplied.)

Later when Mr. Harrison was asked about producing witness Cates, he stated as follows:

> ''Mr. Resner. Let me ask you this: If we don't subpoena him, do you intend to call him?
> Mr. Harrison. I do not.'' (R 283).

There is an established principle of law that the failure of a party to call as a witness one of its employees raises a presumption that his testimony would be unfavorable to that party. See *The Prudence,* 191 Fed. 993, at 996, where the Court stated:

> ''The failure of the Prudence, either to produce the mate who was in the pilot house at the time of the collision, or to account satisfactorily for not so doing, is a circumstance which the court cannot fail to observe in reaching its conclusion.''

See also *The M. E. Luckenbach,* 174 Fed. 265, in which the Court held it was within the power of the respondent to produce evidence, and its failure to produce such evidence constituted a presumption against it on that issue.

In the case, *The Georgetown,* 135 Fed. 854, the Court held that where the evidence largely preponderates in favor of one side, the failure of the other to call members of the crew of its vessel who were in

a position to know the facts is a circumstance entitled to be considered against it.

In *Barrett v. City of New York,* 1947 A.M.C. 1134, the failure to produce the tug captain, an important witness created a presumption that he knew something that would have been damaging to his vessel's case.

Cates was a highly important witness. He was the whistleman in charge of the operations of the crane and he was present at the time of the accident. The failure of the Government to produce him can only be presumed, in the eyes of the law, to be due to the fact that his testimony would be highly unfavorable to the Government's theory of the case.

IV.

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE AND SHOULD NOT BE DISTURBED.

The trial Court found that "* * * United States of America so negligently and carelessly managed, operated, maintained and controlled the aforesaid barge and floating crane BD 3031 that they did cause said jet airplane to fall from the hoist by which it was being loaded and it did fall upon the libelant causing him grievous and severe personal injuries as hereinafter found." (Finding of Fact No. VII, R 63).

It was further found that: "* * * it is true that said barge and floating crane BD 3031 was carelessly

and negligently operated and controlled by respondent United States of America and it is true that as a direct and proximate result of said negligence and carelessness a jet airplane was caused to and it did fall upon the libelant, crushing him and causing him grievous and severe personal injuries as hereinafter found." (Finding of Fact No. VIII, R 63).

The Court further found in Finding of Fact X that "* * * it is true that as a sole, direct and proximate result of the exclusive negligence and carelessness of respondent United States of America a jet airplane was caused to and did fall upon libelant and libelant thereby was caused to and did incur grievous and severe personal injuries * * *" (R 64).

With respect to the Government's petition impleading Jones Stevedoring Company, the trial Court found that "* * * respondent-impleaded, Jones Stevedoring Company, had no direction or control of the use or management or operation of said derrick barge." (Finding of Fact No. IV, R 54). Also that "* * * It is not true that any injuries sustained by the libelant were caused in whole and/or in part or at all by the carelessness and/or negligence of Jones Stevedoring Company in directing said libelant to stand under a swinging load in a precarious position several yards above the main deck of the vessel and/or in failing to provide and/or request any decking and/or scaffolding and/or other safety appliances for the use of said libelant. It is true that Jones Stevedoring Company did not direct libelant to stand

under a swinging load in a precarious position several yards above the deck of the vessel, and it is true that decking and/or scaffolding and/or other safety appliances were not required or necessary and that Jones Stevedoring Company was not required or under any duty to provide or request any of these appliances. It is not true that said injuries suffered by libelant, or any of them, were in any way caused in whole or in part by any act or negligence and/or carelessness upon the part of Jones Stevedoring Company, its employees, servants or agents, and it is true that all of the injuries suffered by libelant were caused solely and exclusively by the negligence of respondent United States of America." (Finding of Fact V, R 54, 55).

The Court further found that the Government was liable in damages to libelant under the amended libel but that such liability was neither in whole nor in part proximately, or at all, caused by or contributed to by the fault or negligence of Jones Stevedoring Company, but that said liability was exclusively that of the Government and that its exclusive negligence was the sole and proximate cause of the accident. It was further found that "It is not true that Jones Stevedoring Company is obligated under the contract or otherwise, or at all, to respond to the United States of America either by way of contribution or indemnity under said contract or otherwise, or at all, and this Court finds that there is no liability on the part of Jones Stevedoring Company under the terms of

said contract, or otherwise, or at all." (Finding of Fact No. VI, R 55-56).

The Court also found "That the issue of whether or not the Jones Stevedoring Company and/or Fireman's Fund Insurance Company must reimburse the United States for such portion of the liability herein founded on loss of earnings so far as compensable under the provisions of the Longshoremen's and Harbor Workers' Act and the contracts of insurance therein referred to, although argued and presented, is not properly determinable in this action." (Finding of Fact XII, R 58).

These findings of fact, both as to the Government's liability to Luehr and as to the claimed liability of Jones, and the corresponding conclusions of law are fully supported by a preponderance of the evidence submitted to the trial Court. Accordingly, none of the findings of fact or conclusions of law in either case are subject to being disturbed on appeal.

V.

A TRIAL DE NOVO IS NOT AVAILABLE TO THE APPELLANT SINCE ALL OF THE EVIDENCE RELATING TO THE QUESTION OF THE ALLEGED NEGLIGENCE OF APPELLEE JONES WAS GIVEN BY ORAL TESTIMONY OF WITNESSES IN COURT.

The only witness whose oral testimony was not heard in open Court was Cecil Bailey, the Government employee whose negligence admittedly caused the plane to drop upon and injure appellee Luehr.

His deposition was read into evidence. The oral testimony of the remaining 24 witnesses was heard and evaluated by the trial Court. All of the evidence as to the question of whether appellee Jones, or any of its employees, were guilty of negligence as charged by the Government was by way of oral testimony of these witnesses. The trial was lengthy and the witnesses were thoroughly examined and cross-examined by counsel for the respective parties as well as by the Court. As a consequence, the trial Court was able to evaluate fully the weight to be given the testimony of the various witnesses.

It is not believed that this Court should or will try this case *de novo*. The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the testimony is adduced from witnesses personally present.

In the case of *Catalina-Arbutus,* 95 Fed. (2d) 283, Judge Denman of this Court stated:

> "While this admiralty appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses, save one, and his deposition clearly sustains those heard. Ernest H. Meyer (9 CCA), 1936 A.M.C. 1179, 84 Fed. (2d) 496, 501; Silver Line et al. v. United States, et al. (9 CCA), 1938 A.M.C. 521."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 Fed. (2d) 826, wherein it was said:

"It appears to be impossible to convince the bar that we will disturb findings of fact as seldom in admiralty causes, as in any other. Whether there lingers a notion—never in fact justified—that because an appeal in the admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court."

To the same effect are many other cases, including:

Heranger, 101 Fed. (2d) 953 (9 C.C.A.);
City of Cleveland v. McIver, 109 Fed. (2d) 69;
Commercial Molasses Corp. v. New York Tank B. Corp., 114 Fed. (2d) 248;
The S.C.L. No. 9, 114 Fed. (2d) 964.

This Court in the case of *Tawada v. United States,* 162 F. (2d) 615, spoke as follows on this precise point:

"In an appeal in admiralty, where a substantial part of the evidence was heard in open court, the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness'. *Thomas v. Pacific SS Lines, Ltd.* 9 Cir. 84 F. (2d) 506, 507, 508; *The Pennsylvanian,* 9 Cir. 149 F. (2d) 478, 481. And 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presump-

> tion (that the findings of the District Court are correct) has very great weight.' "

This Court succinctly stated the rule in *Stetson v. United States,* 1946 A.M.C. 900, 155 Fed. (2d) 359 (C.C.A. 9th) and in *Bornhurst v. United States,* 1948 A.M.C. 53 (C.C.A. 9th) as follows:

> "The findings are supported by substantial evidence, are not clearly erroneous, and hence should not be disturbed."

This Court in a most recent case, *Kulukundis v. Strand,* No. 13,229, decided on March 10, 1953, reiterated the long standing rule against retrying cases on appeal where factual issues have been resolved by the trial Court. The findings of the District Court on the question of negligence was challenged and this Court held in that respect as follows:

> "To the extent it is urged that the District Court resolved the factual issues against the weight of the evidence, we are limited in the scope of our review by the general rule, in admiralty proceedings, that *the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous."* (Emphasis supplied.) Citing the following authorities: *The Rocona v. Guy F. Atkinson Co.,* 173 F. (2d) 661 (9 Cir. 1949); *Fiamengo v. The San Francisco,* 172 F. (2d) 767 (9 Cir. 1949), Certiorari den. 337 U.S. 946; *Ford v. United Fruit Co.,* 171 F. (2d) 641 (9 Cir. 1948); *Heder v. United States,* 167 F. (2d) 899 (9 Cir. 1948).

A review of the record in the case at bar makes it clear beyond any reasonable question that the District Court's findings are fully supported by very substantial evidence. Indeed, the evidence is so overwhelming against the Government that it can truly be said that there is really no conflict at all.

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellees and against appellant. It is therefore respectfully submitted that a trial *de novo* is not available to the Government.

VI.

THE GOVERNMENT'S AUTHORITIES ON THE QUESTION OF THE ALLEGED NEGLIGENCE OF THE APPELLEE JONES ARE DISTINGUISHABLE IN THAT THE FACTS HERE ESTABLISH WITHOUT QUESTION THAT THE ACCIDENT WAS CAUSED SOLELY AND PROXIMATELY BY THE NEGLIGENCE OF THE GOVERNMENT.

The case of *Porello v. United States* (C.A. 2nd Cir. 1946), 153 F. (2d) 605, which is cited in support of the position taken by the Government that there can be more than one proximate cause of an accident is based on facts entirely different from those involved in the case at bar. The libelant in that case was injured by the falling of a strongback from a hatch into the lower hold. It was found from the evidence that libelant's employer was "at fault because its foreman negligently loaded the cargo in a manner which caused the strongback to be unshipped". (P.

606). In other words, the stevedoring company in that case was held liable-over to the Government as the owner of the vessel because of the specific negligence of the foreman in allowing the strongback to be unseated during the loading operations. The Court further found that "the raising of the vehicle unseated the strongback, causing it and a number of the hatch cover planks to fall into the hold and hit the libellant. Di Mare, the foreman, knew that the lock was missing and should have realized the danger of unseating the strongback, if the vehicle was raised. The trial judge found Di Mare was negligent in handling the draft, and that the libellant's injuries resulted from the negligence of both the respondent and the stevedoring company." (P. 607).

Clearly, the facts in the instant case show that there was no negligence on the part of the Jones foreman or any of its employees. Luehr was doing precisely what his job required him to be doing and was in the exact place he had to be to steady and guide the plane down to its final resting place. The accident simply resulted from the admitted negligence of the Government employee in dropping the plane upon Luehr.

Larsson v. Coastwise Line (9 C.C.A. 1950), 181 F. (2d) 6 had to do with an injury to a member of the crew caused by the negligence of a Chinese stevedore employed by the Republic of China. The injury was caused by the Chinese stevedore's throwing into operation a winch which libelant was oiling. There was

a shut-off valve which libelant could have used which would have avoided any possibility of accident while he was oiling the winch. The defense of the case was based upon the contention that "the injury to appellant resulted from his failure to use the simple safety precaution of cutting off the steam from the winch valve before proceeding to oil the winch" (page 8), based on a case with facts almost identical: *Shields v. United States,* 175 Fed. (2d) 743, certiorari denied, 338 U.S. 899. This Court held that the District Court was justified in finding that appellant knew about the shut-off valve on the winch and being a man of experience, must have known that by its use, his job of oiling the winch would be rendered absolutely safe (Page 9).

We fail to see how this authority in any way applies to the facts in the case at bar.

The quotation from 65 C.J.S. Section 122, page 732 has no application. It is agreed that if one having a choice between two courses of conduct pursues one that is dangerous rather than one which is safe where an ordinarily prudent person would not have so chosen, that he is guilty of contributory negligence. But such a situation does not prevail here. There was only one way in which Mr. Luehr could have steadied the plane and he was doing it in the usual, proper and customary manner, and he was in the position where he had to be at the time he was injured as the result of the negligence of the government employee.

Uzich v. E. & G. Brooke Iron Co. (D.C.E.D. Pa. 1947), 76 F. Supp. 788, is a case in which a steeplejack painter was denied recovery for an injury caused by his grasping a cable of a hoist in order to move around the cable. The motor at this instant was started by an employee of the defendant which caused the cable to be drawn rapidly upward, as a result of which the plaintiff's hand was drawn into a pulley. The Court properly held that "the testimony of the plaintiff himself, in the light of the undisputed facts, demonstrates beyond all doubt that he was contributorily negligent. Granting that he had to get on the other side of the cable in order to finish the job, and even provisionally agreeing with his counsel that that fact, might if there was no other way to do it, have justified his taking some risk (an extremely doubtful proposition), it is perfectly clear that the danger which he incurred and which resulted in the accident could have been entirely avoided without preventing his finishing his work. He needed only to have pulled himself up on the platform and let himself down on the other side of the steel arm. There was no necessity whatever for his attempting to pass around the cable on the outside." (Page 789).

To put it mildly, it is extremely farfetched to make the slightest comparison between the facts involving Luehr's accident and the situation presented in the Uzich case.

McKenney v. United States (D.C.N.D. Cal. S.D. 1951), 99 F. Supp. 121, is a case in which the libelant

was a junior third mate aboard respondent's vessel and was injured during a lifeboat drill when the bos'n tripped the releasing gear without orders to do so from the libelant, causing the boat to fall a distance of several feet into the water. The Court held that libelant's own negligence contributed to the cause of his injuries by reason of the fact that he, being in command of the emergency boat drill, negligently exposed himself by standing in a position where he had no business to be. The Court observed significantly that "although he contends that it was proper seamanship for him to have been standing in the stern thwart as the lifeboat was being lowered, there is compelling testimony to the contrary. The libelant was standing in an open and exposed position. Above the thwart there was only eight inches of freeboard up to the gunwales and his sole means of physical support consisted of the tiller, upon which he kept one hand. Yet the evidence discloses the fact that the tiller was not in a fixed position, but rather, that it was subject to a swinging, lateral movement. The libelant testified that he was too occupied, because of this position, to be able to make use of a man-line to try and save himself when the boat fell." (Pages 123, 124.) It can readily be seen that the situation in the *McKenney* case has no application to the problem involving Mr. Luehr's injuries.

The facts in the case of *Barbarino v. Stanhope S. S. Co.* (C.A. 2d 1945), 151 F. (2d) 553, are completely dissimilar and clearly distinguishable from the proven

facts in the *Luehr* case. The longshoreman in the *Barbarino* case was injured as the result of a breaking of a defective bolt which caused the boom to drop while it was being raised. The shipowner upon being sued impleaded the injured man's employer charging that the latter was negligent in the method of doing the work in that "too much strain was thrown on the bolt which caused it to break and to let down the boom".

The trial Court found "there was no evidence that the stevedore's employees were negligent in their management of the chain attached to the 'topping lift' and "that the boom fell because the bolt broke; that it broke because it was defective".

The Court of Appeals held: "We shall assume for argument that the boom fell because the bolt broke and that the bolt was defective; but we wish it understood that both these issues (one of the issues being immaterial here) will be open upon a new trial, and that we now decide only the question whether, in addition, the stevedore was negligent in the way in which it did the work" (p. 554). The Court held: "It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the

failure to protect them by so simple a means. However, we will not hold the stevedore liable upon this record. The point which we are deciding was not very fully developed; and other evidence may come out at the new trial, which will put a new face upon it. We will merely reverse the decree exonerating the stevedore and remand the case for a new trial not only as to the shipowner, but as to it." (pp. 555-556).

As can be seen, there was actually no reason for the men to be under the boom, whereas Luehr had to be where he was in order to perform his work. Even so, the Court did not hold the stevedore company liable in the *Barbarino* case, but remanded the matter back to the trial Court for further evidence.

It is claimed that *Pan Am. Petroleum Co. v. Robins Dry Dock & R. Co.* (2d Circuit, 1922), 281 Fed. 97, at 109, is authority for the proposition that "the burden of proof is upon the stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions" (Government's Brief, p. 25). The case cited has to do with the question of bailment and whether a repair contractor made customary tests with respect to electric telegraph equipment after the repairs had been made. The Court simply held that the contractor must show that the tests which the defendant did make were the customary ones or of equal effect in order to enable it to avoid liability for an accident resulting from the wrong connection of the telegraph. The Court held that "the burden was on the libelant to prove the contract and that

at the time the respondent delivered back the ship the telegraph was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that the respondent had not performed its contract, and was responsible for the condition in which the telegraph then was. The burden then rested on the defendant to overcome this presumption, and to establish by a preponderance of the evidence that it had fully performed its agreement and that the crossing of the wire and chain connection of the ship's telegraph was not due to its workmen's lack of skill, or careless conduct of the work, while the ship was in the respondent's possession'' (p. 109).

In the case at bar, all that the Government did was to set up the stevedoring contract as a basis for seeking recovery-over from Jones. The Government most certainly did not prove that it suffered damage as a result of improper performance of the contract. Therefore, it is preposterous to say ''that the burden of proof is upon the stevedore to show why they did not use due care to avoid exposing its men to dangerous conditions''. Even if the burden of proof rested upon Jones, it was clearly met by overwhelming evidence that Luehr properly performed the work he was required to do and was in a position where he had to be in order to carry out the work assigned to the stevedore company by the Government.

CONCLUSION.

For the foregoing reasons, it is altogether clear that this appeal involves nothing more than an argument involving purely the facts at issue and there is no question of law for the Court to consider. The trial Court's findings of fact and conclusions of law are so overwhelmingly supported by substantial evidence proving conclusively that the accident was solely and proximately caused by the appellant's negligence, that it is respectfully submitted that the District Court's decree in favor of appellee Jones is lawful and should not be disturbed.

Dated, San Francisco, California,
May 11, 1953.

Respectfully submitted,
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Jones Stevedoring Company.

No. 13562

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK LUEHR and JONES STEVEDORING COMPANY, a corporation,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE FRANK LUEHR.

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BRIEF FOR APPELLEE FRANK LUEHR.

Introduction.

By and large, this appeal presents purely factual questions wherein appellant United States is attempting to relitigate in this court factual issues which were all resolved against it in the trial Court. A review of the evidence and applicable authorities will demonstrate that the Government's appeal is entirely without merit.

Summary of Argument.

I.

The Government was plainly negligent and therefore liable for damages in dropping the airplane on appellee Frank Luehr. Luehr himself was free of any contributory negligence proximately causing the accident.

II.

The trial Court made a lump sum award of damages to Luehr in the amount of $125,000. The right of the Government to reduce this award under its anti-subrogation agreement with the employer Jones Stevedoring Co. and its carrier Firemen's Fund Insurance Co. on account of compensation payments and medical services rendered to Luehr by them was not raised by the pleadings nor litigated in the Court below and cannot now be litigated here. The fact that compensation payments were made and medical services provided does not of itself entitle appellant to *pro tanto* reduction of the judgment as against Luehr, but appellant must litigate this claim in a separate suit against the employer and its carrier in which appellee Luehr has no interest.

III.

The injuries were extensive, severe and disabling. The damages suffered by Luehr were enormous. The award of $125,000 made to him was supported by substantial evidence and is most reasonable. There is no basis to reduce the damage award.

IV.

The judgment in its entirety is supported by substantial and convincing evidence and while an admiralty appeal is a trial *de novo,* there is no basis for reversing the judgment in the absence of clearly reversible error. There is no such error even suggested by the record in this case.

V.

The damages should be increased. Luehr has suffered additional injuries and medical expenses since the trial which are greater than anticipated at the time of trial. Evidence should be taken in this Court on the matter of Luehr's additional injuries and damages.

I.

Appellant United States Was Admittedly Negligent. Appellee Frank Luehr Was Free of Negligence.

The liability aspect of this case is purely factual. As far as we can see, there are no disputed questions of law involved. Elementary principles of maritime tort liability apply.

Where one engaged in a ship loading operation, such as the Government was performing here, is negligent, through the acts of a servant, liability follows.

American Stevedores v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 1947 A. M. C. 349;

Sieracki v. Seas Shipping Corp., 328 U. S. 25, 90 L. Ed. 1099;

The Max Morris, 137 U. S. 1, 34 L. Ed. 586;

Porello v. United States (C. C. A. 2), 153 Fed. 2d 605;

Pool Shipping Co. v. De Groat (C. C. A. 5), 112 Fed. 2d 245;

Baccile v. Halcyon Lines (C. C. A. 3), 198 Fed. 2d 403;

Rothschild Stevedoring Co. v. United States (C. C. A. 9), 183 Fed. 2d 181;

Kulukundis v. Strand (C. C. A. 9), No. 13229, decided March 10, 1953.

The Government concedes that it was negligent when the crane operator Bailey disengaged the lever releasing the cable which caused the jet airplane to fall on appellee Frank Luehr.

The Government seeks to avoid the consequences of its admitted negligent acts in two ways, first, by claiming

that there was negligence on the part of the Jones Stevedoring Co., Luehr's employer, in ordering him into a dangerous place to work and, secondly, that Luehr himself was negligent by going under a load being landed.

Before the Government concluded the trial with the positions just stated, it had asserted a number of other theories designed to relieve itself of liability. Amongst these were the arguments that the stevedore employer should have built stagings for Luehr and the other longshoremen to stand upon while the planes were being loaded, or should have provided other means so that the longshoremen would not have had to stand upon the mechano deck. [See testimony of the witness Lehmkuhl, R. 582-589.]

This argument was directed against the Jones Stevedoring Co. but the Government was apparently unconvinced that the argument had any merit and so abandoned it. At least it was not seriously argued at the trial and is not argued at all on this appeal.

It is not necessary, of course, for Luehr to argue the point that his employer was not negligent in directing him to work as he did. That is not his legal concern. Even if Luehr's employer was negligent (which it was not) such negligence cannot be imputed to the employee Luehr.

Rothschild Stevedoring Co. v. United States, supra.

Appellee Luehr does argue and take issue with the Government's contention that he himself was negligent in "going under the load."

In this connection, Luehr states, first, that he did *not* go under the load, and secondly, that he was *working as directed* by his superiors and that as a conscientious workman he followed orders.

Furthermore, the Government's entire argument on this score completely dissolves in the light of the actual situation as disclosed by the testimony which demonstrates that Luehr *did not go under the load* as it was being lowered, but *waited* until it reached almost *shoulder height,* and then *approached* the plane to *grab hold and guide it in,* when suddenly it fell without warning and with such speed and force as though "the falls were cut."

Thus Ted Spirz, in charge of the operation for the stevedoring company, testified:

> "Q. (By Mr. Resner) Now, did you see Mr. Luehr right before this accident? A. Well, yes, when I was standing here (indicating).
>
> Q. You said here, on the catwalk, you have indicated on the catwalk? A. Yes, and the plane was coming over, all tag lines were taken care of, I looked inshore when I saw Mr. Luehr standing over here by the stays, and *we waited for the plane to come down,* and when the plane *stopped and we were ready to take over and hold onto it,* I saw Mr. Luehr coming over and *grab* hold of that, the left rear landing strut stand, I presume that is what it was, that is where he was.
>
> Q. That was his job there? A. That is his job, to hold onto the plane and steady it.

Q. Was he doing what he was required to do at that particular time? A. That is correct." [R. 114-115.] (Emphasis ours.)

Martin Ingbrigtsen, the gang boss, *who was called as a witness by the Government,* testified as follows:

"Q. (By Mr. Harrison) The walking boss told you to send a man up there? A. Yes, and this gentleman, (Luehr) he was nearest to me, so *I asked if he would go up there,* please.

Q. Just before the accident happened, Mr. Luehr was standing near to you on the same deck, is that correct? A. Yes, he was on deck, yes, but *when the plane come in I told him to go up and steady it.*

Q. You told him to go up and steady the plane? A. That was orders from Mr. Spirz; get a man up there.

Q. Pursuant to order from Mr. Spirz? A. That is right.

Q. Did Mr. Luehr go up there? A. He did.

Q. Did you watch what he was doing when he got up there? A. He was *standing by* to *steady the plane* when it come down.

Q. He was standing by to steady the plane? A. Yes. He had to get some blocks to put underneath the plane." [R. 538.] (Emphasis ours.)

* * * * * * * *

"Q. (By Mr. Resner) Mr. Ingbrigtsen, Mr. Luehr was working there where he was supposed to be, was he? A. Either him or somebody else.

Q. Either him or somebody else? A. Yes. *We had to have the man there.*

Q. You had to have a man there? A. Yes, sure." [R. 539.] (Emphasis ours.)

Mr. Luehr himself testified that he was where he was supposed to be and that he was following orders.

"Q. (By Mr. Resner) Now, Mr. Luehr, I want you to tell the judge just what you were doing and what you saw and what happened with regard to how this accident happened? A. Well, the best I remember is that while this plane was being hoisted off the barge and it probably was around forty feet in the air—that is off the deck, and it has to be that high to clear all the stays and other obstructions on the ship so it won't be damaged in any way.

As the plane was being taken over to the port side of the ship, it was lowered and maybe it stopped once or twice so that the plane, the wings, the fuselage not being damaged in any way. I was on the main deck, and after the plane was coming down I got up on the mechano deck. There is no way of getting up there but climbing up. There is no stairway. *I was standing way out on the outer edge as the plane was coming down, and it stopped,* I think, within about six feet of the mechano deck. What I mean, six feet of the bottom of the fuselage on the mechano deck." (Emphasis ours.)

* * * * * * * *

"A. I remember the *whistle man giving the signal to stop the plane, and it did stop;* and as it did *I moved forward a few steps,* maybe four or five, to get in the position that I was, *so I could help steady the plane.* There is no way of getting hold of the plane outside of probably the strut with one hand and the fuselage with the other." (Emphasis ours.)

* * * * * * * *

"Q. (by Mr. Resner) What were you standing on, Mr. Luehr? A. Well, I was standing on this

mechano deck. I don't know just exactly how wide they are. Seems to me they are about six or eight inches wide.

Q. Were you standing on one of the solid beams? A. Yes."

* * * * * * * *

"A. That is correct. You had to stand in that kind of position on the mechano deck to brace yourself. In holding that plane with your left hand on a strut and your right hand on the fuselage, evidently you will have to be pretty close to the plane or—probably the wing would probably be just about over your shoulder, or the fuselage. I don't remember just exactly.

But *all of a sudden something gave way as though a line was cut.* It dropped and it hit me on my left shoulder and threw me forward with a great crash. I landed head first down toward the deck." [R. 292-294.] (Emphasis ours.)

And in response to Mr. Harrison's questioning, Luehr explained that he was steadying the plane.

"A. . . . I was on this beam on the inshore side. *I wasn't in any way of the plane* if it would have dropped that I would have got hurt at that time. But as the plane was coming down to about, I would say, six feet, I mean between—of the mechano deck, the plane to the mechano deck, *the plane stopped.* The man, what they call the *whistleman, blew his whistle, and the plane stopped,* and *as it stopped I walked forward to help steady the plane.*" [R. 340.] (Emphasis ours.)

And again Luehr testified:

> "A. . . . Now, when *I had hold of this plane trying to steady it—the whole plane dropped so fast.* Now just exactly what hit me, whether the fuselage or the wing, I don't remember, but *it dropped just as though the line was cut,* and the whole plane—I don't know what it weighs, probably four ton, five ton, I don't know what it is came down so fast it hit me on my left shoulder, and as it did it threw me forward with my head hanging to the main deck." [R. 341.] (Emphasis ours.)

One of the *key witnesses* in the case was Charles Cates, a Government employee who acted in the capacity of *whistleman,* (referred to in the preceding testimony). His deposition on discovery was taken by appellee Luehr prior to trial and is an exhibit on this appeal. [R. 732.] Since he was a *Government employee* and a *key witness* it was obviously the *duty* of the *Government* to *produce* him as a *witness* in this case. That the Government *refused* to do. [R. 283.] Such being the case, a clear and compelling inference follows that the testimony of this key witness would be adverse to the Government.

Such not only is the inference, *it is the actual fact.* On his deposition, the whistleman, Cates, testified that Luehr was at a place where he was *supposed to be.* In the Cates deposition, at page 24, the following appears:

> "Q. (by Mr. Resner) Had you noticed him there before the accident? A. *Well, all these men working there would have to be in a position like that and steady the plane as you maneuver it around.*
>
> Q. There in the position, then, where they were supposed to be to land the plane? A. *They were*

supposed to be there. That is where they were told to be.

Q. *And that was their station and that was Mr. Luehr's station?* A. *That's right.*

Q. Now, you didn't notice Mr. Luehr particularly? A. No, I didn't.

Q. Any more than these other longshoremen there? A. That's right." (Emphasis ours.)

The trial Court early in the trial recognized the fact that whether the loading operation was dangerous or not, it was being done the only way it could be done:

"The Court. He (Spirz) has outlined a situation here, the necessity, whether it is dangerous or not, in order to land the plane, get it in place, the man has to get under it, and that is dangerous." [R. 126.]

The answer was given by Spirz:

"I consider it dangerous to a certain extent if the load falls, you're under it, you have to get under it to land that plane, have to be underneath it, have to hold that tripod and three stands, and under that plane, hold on to the tripod, and it is suspended, if something happens, you are under it, and that is it. But *you can't land that plane by standing ten feet away.* You have to hold on to that stand." [R. 126.] (Emphasis ours.)

It is abundantly clear that Luehr was in a place where he was supposed to be, had to be, and was told to be; that he was doing the job in a correct way, in the way that

it always had been done, and in the only practical way that it could be done.

Concededly, stevedoring is dangerous work. That is one of the reasons why such exacting liability is imposed upon third persons whose negligence or whose unseaworthy vessels or gear causes injury to a longshoreman. (*Cf., Sieracki* case, *supra.*)

The fact that Luehr was doing a dangerous job or that he was in a place where an accident might occur does not change the situation from what occurs a thousand times a day in the loading and unloading of ships. The fact, however, that stevedoring is hazardous work does not relieve a negligent party, such as the Government in this case, from the consequence of its negligent conduct.

In this case, not only was the Government negligent but its negligence was *the proximate cause* of the accident. The fact that Luehr was where he was or that he was sent to that place to do his work did not cause the accident. *The active force which produced the accident was the negligent act of Bailey in dropping the plane.* That was the *effective, producing, causative* factor of the accident, its proximate cause. For these reasons liability fastens upon the Government.

> *Porello v. United States* (C. C. A. 2), 153 F. 2d 605, p. 607.

The Government argued that the Safety Code forbade sending a longshoreman under a moving load. First, as

we have seen, Luehr did not go under a moving load. Secondly, the rule did not apply to the loading operation which was going on here. [R. 683.] The provision in the Safety Code that sling loads are not to be suspended over men's heads does not apply to loading planes on mechano decks. [R. 684.]

Finally, the rules provide that longshoremen shall take hold of the load when it reaches shoulder height. [R. 691-692.] Even if the Safety Code provisions referred to applied in this case, Luehr's actions were completely in accord with the Code.

This was purely a factual case. The trial Court heard all the witnesses except Bailey, whose deposition was read, and resolved the factual issues in favor of appellee Luehr.

See the comparable recent decision of this Court.

Kulukundis v. Strand (C. C. A. 9), No. 13229, decided March 10, 1953.

In the *Kulukundis* case, *supra,* an argument similar to the Government's was made to and rejected by this Court.

The record amply supports the trial Court's findings that the Government was negligent, that its negligence was *the* proximate cause of the accident, that Jones Stevedoring Co. was not guilty of any negligence proximately causing or contributing to the accident, and that Luehr himself was not guilty of any contributory negligence.

On the liability question, the decision of the district judge is overwhelmingly supported by the evidence and should be affirmed.

II.

Appellant United States Is Not Entitled to a Credit Against the Judgment for Compensation Paid to or Medical Services Provided Appellee Luehr.

In this case the record discloses that Luehr received compensation from the Firemen's Fund Insurance Company, his employer's compensation insurance carrier, in the amount of $3,082.20, and that medical services were provided for him by the carrier in the sum of $7,322.32. The Government is seeking to reduce the award by this amount on the basis of its so-called anti-subrogation agreement with the employer.

We do not think that this Court has the power to alter the judgment in this respect because the matter was not litigated in the Court below and was not raised by the pleadings. It is clearly evident from the decision of the trial Court that a lump sum award was made in favor of Luehr in the amount of $125,000. That award was made without regard to the compensation paid and medical services provided to Luehr. This is abundantly clear by reference to the record. The Court says:

> "Let me give you my thought on this matter. I want to sustain a judgment against the Government in relation to this $125,000.
>
> Mr. Harrison: The findings which I have proposed do that, your Honor.
>
> The Court: Now then, the other issue between you and the carrier, I am willing to give you the opportunity of having your day in court on that." [R. 720.]

Judge Roche stated that he wanted to sustain a verdict for $125,000 in favor of Luehr and leave the situation

where the Government would have its day in court to litigate the anti-subrogation claim against Firemen's Fund. That problem was none of Luehr's concern.

> "The Court: What I am trying to do is dispose of the matter at hand. I made a finding in respect to your client . . .
>
> Mr. Resner: Yes, Judge.
>
> The Court: . . . for $125,000. Now this other situation has arisen, and I think it was generally known, discussed superficially. I want you to have your day in court in relation to that. That is all." [R. 726.]

Counsel for the Government indicated that it was going to sue the Firemen's Fund and Jones on this claim.

> "The Court. All right, you are still going to sue Firemen's Fund?
>
> Mr. Harrison. We are going to sue both of them." (Jones and Firemen's Fund.) [R. 726.]

The trial Court made it very clear that it was awarding a lump sum of $125,000 to Luehr and that the anti-subrogation problem would have to be litigated separately. The following colloquy occurred:

> "Mr. Harrison: In that $125,000 I am sure your Honor intended to include all the medical expenses, both past and future.
>
> The Court: I am not prepared to say that.
>
> Mr. Harrison: The $125,000, then, is over and above . . .

The Court: Not necessarily. I tried to indicate to you—this matter was discussed and I made an inquiry, 'Do you want a lump sum judgment in this case'? And that was limited to the client. This other controversy that raised up, that will have to be litigated.

Mr. Harrison: *I agree,* but we are discussing a finding in Mr. Luehr's case, and the $125,000 includes all Mr. Luehr's items of damages, does it not? There is nothing more coming? (Emphasis ours.)

Mr. Resner: We don't say that. All we say is the judge made a general award and preserved to you, Mr. Harrison, your right to litigate out any right you may have to recover. Isn't that correct? That is what the judge said. He said he would make a lump sum award and preserve to you without prejudice." [R. 728.]

The only authority the Government counsel cites to support its position that the verdict should be reduced on account of payments of compensation and medical service is *Palardy v. United States* (E. D. Pa.), 102 Fed. Supp. 534.

In the cited case the trial Court made it clear that it was considering compensation payments and medical services in rendering the award. In our case, the Court made it equally clear that it did not regard the compensation matter as being before it. At least it was not a basis to reduce the award for Luehr, who was given a general

judgment. The record does not disclose the fact but that problem could have been posed by the pleadings in the *Palardy* case. In our case the Government made no mention in its pleadings of its anti-subrogation contract, and the point was not litigated. We do not think it can be litigated on this appeal. If anything, the Government must resolve that problem by another law suit between itself and Jones Stevedoring Co. and Firemen's Fund Insurance Co. The claim is not one against Luehr.

Finally, a person who is liable for payment of damages is not entitled to be relieved of its own liability because some other party may be liable for or have paid the same items of damage.

> *Standard Oil Co. v. United States* (C. C. A. 9), 153 F. 2d 958.

Furthermore, medical services were provided at the industrial rate, at least one half to one third lower than private rates. Had the compensation carrier not supplied this service, the Government would be liable in damages for the higher amount of private service. It is difficult to see why the Government should complain at having its damages minimized. Furthermore, the carrier was obliged to pay compensation and provide medical services or be penalized under the Longshoreman's Act. (33 U. S. C., Sec. 901, *et seq.*)

We submit that the judgment must not be reduced by the amount of compensation and medical service payments.

III.
The Damages Were Not Excessive.

The remarkable fact about Frank Luehr's case is that with the kind of accident he had and the tremendous injuries he suffered he lived to tell the tale. When one recalls that a sixty-five ton crane was required to load the airplane, that when the plane fell it was as though the falls were cut [R. 116], that the plane weighing several tons fell directly on Luehr with such force that it bounced a foot in the air after striking the mechano deck [R. 116], that Luehr, after being crushed between the plane and mechano deck, was thrown to the main deck some twelve feet below, one gets an appreciation of the great violence of the accident which this man suffered.

Ordinarily, such an accident would have produced instant death for its victim. That such did not occur here is the only fortunate result of the accident for Frank Luehr! The accident took its terrific toll upon his body, health, spirit and happiness. He is today and for the remainder of his life will be a maimed and crippled man. He will never return to his former occupation of longshoreman. He will never be able to pursue any occupation which requires physical labor, the only kind of calling in which he is experienced and for which he is qualified. He is still disabled as this brief is filed, and his condition worse than it was at the time of trial. (See discussion, *infra,* p. 50.)

He will never be without pain again. He will never walk in a normal way again. He will never be able to

enjoy the pleasures that a whole man can enjoy: hiking, running, dancing, hunting, fishing, or the many things that make life worth while—and which are enjoyed by many men of advanced years. He will never know peaceful and untroubled sleep. For the rest of his life, he will bear and suffer the scars of this tragic accident. [R. 311.]

Government counsel have attempted to minimize Luehr's injuries and disability in order to induce this Court to reduce the damage award. Rather than simply refute that argument which was made to and rejected by the trial Court, we will review the positive aspects of the medical evidence and damages as they were presented at the trial and impressed the trial Court.

Luehr was injured on July 28, 1950. Dr. Walker, the treating physician, testified that when he first saw Luehr after the accident the patient "was in a very precarious position." [R. 361.]

> "He had a compound fracture of his leg, left leg, which was giving us the most concern. We were also sure that he had a tremendous concussion injury of the chest because of his breathing and his short respiration.
>
> "We did straighten out his leg, and gave him several transfusions, and well, more or less life saving methods were the things that were used first. * * * He developed thrombo-phlebitis of both legs and a mesenteric thrombosis which gave him a paralytic ileus. * * * This thrombosis is a blood clot that occurs in the veins. His mesenteric thrombosis —that is the supporting structure to the bowel, and he developed what we call a paralyzed bowel. * * * He had interference with all the elements * * *

the kidneys, bowels, and those things. He had to have a catheter in his bladder, and he had to have rectal tubes and enemas. In other words, they were not functioning." [R. 362-363.]

"* * * We fed him by vein for approximately a week to ten days. * * * The obstruction began to clear up, his temperature went down, and he began to look like we were going to salvage—as I told him, salvage his life.

"* * * He had a fractured astragalus. * * * It means the weight bearing bone in the ankle. * * * He kept complaining of pain in his back. We knew he had a contusion of the cord, in other words, he had cord symptoms which are referrable to some of the other symptoms he had, poor coordination in his leg. His bladder was not functioning and his bowels were not functioning. * * *

"* * * He remained in the hospital and continued to improve slowly. We gave him numerous transfusions. After approximately three months we were able to get the wire out of his leg which we had tied the bones together with. They were completely denuded of skin, tibia and fibula, and we tied the bones together and bound them with a splint. In other words, the least trauma we could add to his already precarious position, the better.

"* * * (He) complained of the pain in his back. We took X-rays * * * and found * * * a fractured and compressed lumbar vertebrae, I believe L-1, but it was also posteriorally dislocated. * * * It was pushed backwards clear out of position which is the normal position of the vertebrae approximately one-half inch, which accounted for the contusion of the cord and the various cord symptoms and neurological symptoms he had." [R. 363-365.]

"* * * After approximately three and one one-half months, we were able to get him up and about on crutches and start his locomotion. * * * That was his first admission. That was up until about November 1950. Then after that he was admitted for change of cast several times, and he has also had three or four admissions to Merritt Hospital for what we call saucerization, cleaning out of the infected bone and dirt and material in this compound fracture of his leg." [R. 365-366.]

"The second time he had no covering over his leg, so he had skin flap transplants and another saucerization. * * * I did that in two procedures * * * one on the right and one on the left, and grafted skin off the other leg. * * * He was still draining in August, and we hospitalized him again and had to take out a considerable amount of bone in the sinus tract down to the marrow, into the medullary cord, and we took all the anterior cortex of the tibia." [R. 366.]

"During this time he has been up and walking with the aid of a crutch or cane, usually two crutches. He says the * * * tibia does not bother him so much, but he has pain in his left hip and in his back. He feels better and he has less muscle spasm. * * * His general health has improved markedly. His ill humor certainly is much better, and his disposition, outlook on life is better. He was very depressed and we had quite a few rounds with him to get him in shape, but his general condition is much better than it has been. He still has some other things that have to be done, but that is the picture to date." [R. 366-367.]

Appellant has attempted to deprecate Luehr's pain and permanent disability by references to the record where

in certain instances the patient did not complain of pain and by statements that various fractured bones had healed without disability. This procedure is like trying to shoot an elephant with a pea shooter. Luehr's injuries were so vast and his pain so severe that injuries which would have been major in another case were minor here.

Thus, appellant states that Luehr did not complain of pain in his hip during the first 100 days in the hospital, but neglects to state that Luehr "was lying still most of the time" [R. 299], and that he was hovering between life and death as we have noted, and in his own words, "they had me so doped up that I didn't know what I was doing, if I was coming or going * * *." [R. 298.]

There can be no question of the great severity of the back condition and the accompanying pain. Luehr, speaking of his hospital stay, testified, "As time went on I had a great big lump, almost the size of my fist, in the middle of my back; and that gave me great pain because I couldn't lie on my back, I couldn't lie on my side." [R. 298.]

The hip pain developed later. "I have also a lot of pain lower, around my hips, coming toward the front, which gives me a great deal of trouble." [R. 299.] The pain here developed because of the severe back injury, the derangement of the lumbo-sacral joint, and the fact that the entire spine was damaged and thrown out of its normal alignment. Demineralization of the bone and traumatic arthritis of the left hip joint occurred, and the left leg was shortened about three-quarters of an inch, thereby throwing the body out of balance even more. [Findings, 65-67.]

Appellant seizes a statement from Luehr that "he did not have a great deal of pain in his leg." [Br. p. 41;

R. 301.] But Luehr's complete statement was that his leg was in a cast at the time to which appellant refers, and "I couldn't bend my leg. My leg was perfectly straight." [R. 301.] Obviously pain is lessened when the injured member is held rigid by a cast to aid the healing process.

It must be apparent that Luehr suffered and continues to suffer excruciating leg pain. He had compound fractures of the tibia and the fibula in two places. At least six operations, including bone removal and skin grafts, were required on the leg. There has been and still is a dread osteomyelitis, which will remain as a permanent disability, and which (if it ever heals, which it has not done as yet) is liable to reactivation during life. The anterior cortex of the tibia is gone. The leg is so weak that the tibia was refractured since the trial, in September 1952. (See *infra*, p. 50.) In many respects, the patient is in worse condition than had he lost the leg.

Appellant relies upon certain testimony of Dr. Haldeman to support its arguments trying to minimize Luehr's disability. First, Dr. Haldeman was an examining doctor only, for the purpose of appearing as a Government witness in the case. He saw Luehr only twice. He did not have the advantage of following and treating the patient as did Dr. Walker, and of the extensive medical records and X-rays. Second, on cross-examination, it became apparent that he did not appreciate the full extent of Luehr's injuries when he made his examination. Third, he has obviously misjudged the case.

He testified that it was his opinion when he examined Luehr on November 26, 1951, that the patient would be able to engage in some type of work in three to six months.

The trial occurred in March, 1952. Luehr was then totally disabled for any kind of work. That was four months after Dr. Haldeman's examination. It is now May 1953, seventeen months after Dr. Haldeman's examination, and Luehr is still totally disabled for any kind of work, sedentary or any other kind, and for that matter is disabled for anything but the most simple activity in caring for his immediate personal needs. He is in worse condition than he was at the time of trial. Dr. Haldeman's opinion, we would say, bear little value in a determination of the medical aspects or damages in this case.

The nature and extent of Luehr's permanent disability was set forth in detail by the trial Court in the findings. [R. 65-67.] Appellant did not dispute these findings when they were submitted to the trial Court, and in fact appellant submitted the *identical* findings!

Appellant did not even cross-examine Dr. Walker, except to infer that there was some relationship between the time when Luehr's leg would be again operated upon and the trial date. At the trial, appellant tried to create the impression that a spinal fusion was not indicated. [R. 424.] In its brief, appellant concedes that a fusion was proper, because that might relieve some of Luehr's back pain. (Br. p. 44.) In short, appellant argues the medical evidence at this time in an effort to obtain a reduction in the award, and not because there is anything in the record that supports a conclusion other those reflected by the Court's findings.

Those findings are supported not only by substantial, but by overwhelming evidence. We doubt that a case has reached this Court which approaches this one for extent and severity of injuries. At least we know of none. Luehr

suffered more than twenty bone fractures. The injury to his back alone, or to his left leg alone would disable him for practically any type of gainful employment. Coupled, they leave him a cripple who can look forward only to a life of minimal activity.

The leg injury has not yet healed, and it is two months less than three years from the date of accident. The spinal fusion cannot be performed until the leg heals. [R. 402.] Since the leg has not yet healed, there is no indication when the fusion can be performed. After such a fusion, the patient would be an invalid for at least a year. [R. 403.] There is no assurance that complications will not develop. [R. 404.]

The patient can never return to stevedoring or any hard work. Everyone was agreed on that, Dr. Walker [R. 405], Dr. Haldeman [R. 423], the Court [R. 449], and even Government counsel do not dispute the fact. The argument seems to go that Mr. Luehr might do something such as being a watchman or a gateman. The argument assumes facts not demonstrated, first, that the patient will ever get well enough to do any kind of work, and second, if he ever reached a point where he was not under constant medical observation and care, and in his crippled condition, that he could obtain even the kind of work Government counsel describes for him. Certainly the Government would not employ him in such a capacity, and with the restrictions and requirements being imposed by private industry, it is highly questionable that Luehr will ever find any such employment in that quarter.

Appellant argues that Luehr "is not bedridden, has no paralysis, nor is he entirely disabled for work." (Br. p. 44.) The evidence demonstrates that Luehr is confined to his home as a cripple, and is just as disabled today for

any kind of work as he was when he lay in the hospital with his life in the balance. The statement that Luehr "has no paralysis" is one of those incomprehensible and really unthinking assertions that have marked Government counsel's attitude in this case. We find it difficult to understand what prompts such a comment. It is indeed fortunate for Mr. Luehr that he did not suffer paralysis, which well could have accompanied the injury to his spine. But the fortune which spared Luehr paralysis did not spare him a life of complete disability.

Let us again remind appellant of the Court's findings, with which it not only took no issue when they were submitted, but indeed offered as its own findings!

Finding XI tells the story.

> "It is true that libelant was hospitalized for a period in excess of 100 days immediately following his injuries and that various life saving methods were employed in order to save his life, including blood transfusions, catheters in his bladder, rectal tubes and enemas, intravenous feeding, antibiotics and other methods. It is true that libelant developed osteomyelitis of the left tibia which has required six surgical operations to date and various skin grafts and other treatment. It is true that libelant has been under the continuous treatment of a physician and surgeon from the time of said injury until the date hereof and is still undergoing active treatment.
>
> It is true that libelant has suffered permanent injuries as follows:
>
> 1. Spinal injuries which will require surgical fusion of the spine, which may relieve libelant of some future pain, but which will leave him with a permanent, serious and extensive spinal disability.

2. Spinal cord injury, resulting in scar tissue in spinal cord, which has left the spinal cord in a permanently damaged condition.

3. An active and still present osteomyelitis of the left tibia, which will require further surgical intervention and which osteomyelitis will remain as a permanent disability.

4. A portion of the anterior cortex of libelant's left tibia has been removed and libelant's left leg has been permanently shortened.

5. Traumatic arthritis of the left hip which will remain as a permanent disability.

6. Traumatic arthritis of the right ankle which will remain as a permanent disability.

7. A demineralization of the bones of the left hip, right ankle and left tibia.

8. Fractures of the left fibula which have not united and will not unite at the upper end and have united tenuously with over-riding at the lower end.

All of the said injuries caused the libelant to suffer severe and excruciating pain, suffering, distress, humiliation and anxiety and have caused libelant to lose much sleep and rest. Said permanent injuries to libelant's spine, back, left hip, left leg and right ankle presently cause and will in the future cause libelant severe, extreme and excruciating pain, suffering distress, anxiety and humiliation, and the operations which libelant will be forced to undergo in the future will cause him severe and extreme pain, suffering, worry, distress and anxiety.

It is true that libelant will be required to undergo active medical treatment for a period of approximately fifteen months after the date hereof and will

have to be treated medically for the remainder of his life for said injuries.

It is true that libelant is permanently and completely disabled for any kind of physical labor, but may possibly at some uncertain future date be able to engage in some type of sedentary occuption, requiring his brain rather than his physique. Libelant is untrained and unqualified for any kind of work other than physical labor.

Libelant was born on March 11, 1899, and at the time hereof is 53 years of age, with a life expectancy of between 20 and 21 years." [R. 65-67.]

Bearing in mind that we have a completely disabled former longshoreman, age 53 years, with a life expectancy of 20 to 21 years, we can now reveiw the damages as this factor of the case was presented to the trial Court.

The argument which Government counsel makes to this Court concerning damages was made to and rejected by the trial Court, except that at the trial, Government counsel did not even argue or offer any views concerning damages on the elements of pain and suffering, the "emotional factors," as counsel for Luehr presented and described them. Government counsel asserted an inability to evaluate these factors.

First, there was no argument but that medical expenses as of the time of trial were $7,322.32. [R. 67, Ex. 16, R. 313.]

Second, there was no disagreement that Luehr needed further and continuing medical treatment and attention. Dr. Walker testified that two weeks hospital care at $25.00 per day was needed for the then contemplated saucerization, and that a reasonable surgeon's fee would

be $250 to $300. Cost for this care, therefor, would total about $650. [R. 398.] For the spinal fusion, costs would be at least $525 for the hospital, $100 for operating room service, and $450 for a surgeon's fee, a total of $1,075. [R. 403.] These rates were computed on an industrial basis which are considerably less than private rates. [R. 403.] Since Luehr must pay these expenses himself, he would have to pay a higher private rate.

The patient would have to be followed medically for life with X-ray and physiotherapy, and other symptomatic treatment in an attempt to make him comfortable. [R. 404-405.] There might be recurrence of trouble as has already happened. If a minimum of $500 per year were allowed for life to cover the expenses of continuing care, the lifetime cost would be in excess of $10,000. Altogether, the sum of $12,000 is a minimum for future medical care and expenses.

As a matter of fact, the medical expenses have been greater than anticipated, and will probably increase. It appears that since the trial, Luehr's medical bills amount to approximately $4,740. (See *infra,* p. 50.) Nor is the end in sight. The leg has not yet healed from the September 1952 fracture. (See *infra,* p. 50.)

The spinal fusion is in the unpredictable future. Future medical expenses will undoubtedly be much greater than predicted at the time of trial. Appellant offered no contradictory evidence concerning medical expenses, past or future.

Third, wage loss at the time of trial was $7,572. The Court found that had Luehr been able to work during the period of his disability he would have earned about $7,500 as of the time of trial. That was based on the

average earnings of longshoremen in the Port of San Francisco during the period, a sum of approximately $87 per week. [Finding of Fact XIII, R. 67-68, testimony of Lester R. Paul, R. 140-143, Ex. 15.]

As a matter of fact longshoremen were earning on the average of $100 weekly in San Francisco at the time of trial [R. 143], and Luehr would have been able to earn that much because the longshore work was divided equally between all the registered longshoremen. [R. 135-136.]

The Government offered no different or contradictory evidence on earnings, but rests its argument upon Luehr's average earnings of $64 weekly during the 2½ year period prior to the trial. Such a basis is improper.

The Court was entitled to make its findings of past wage loss as well as future wage loss, not only on what the injured worker himself had earned in previous years, but what he could have earned in the industry and the probability of his earnings increasing in the future. There were two wage increases after Luehr's injury, the hourly rate increasing from $1.82 to $1.92 on September 30, 1952 [R. 141], and to $1.97 on June 18, 1951. [R. 142.]

Wage increases during the period of disability are a proper element of damages. *Guthrie v. Southern Pacific Co.* (C. C. A. 9), 180 F. 2d 295, p. 302. "After Guthrie's injuries, and before trial, wage increases actually made for men in his position would have increased his earnings by one-third * * *." Guthrie's damages were computed on the basis, not of his earnings during the last year he worked prior to injury, but on the basis of what men in his position earned during the period of his disability awaiting trial.

Using the same yardstick in our case, Luehr's wages must be computed on what his fellow workers earned during the period of his disability awaiting trial which was at least $87 per week [Finding of Fact XIII, Ex. 15], and was closer to $100 per week in the three or four month period just before trial. [R. 143.]

Fourth, concerning future wages, the presentation which counsel for Luehr made to the Court was this.

In the 15 month period from the time of trial until June of 1953, during which time there was testimony (more than substantiated by developments since the trial) that Luehr would be under active medical care and totally disabled, his wage loss was fixed at approximately $5,600 based on the $87 weekly figure. [Finding of Fact XIII.]

In the period from June of 1953 to June of 1964, when Luehr would reach the accepted retirement age of 65, a period of 11 years, Luehr would be physically incapacitated for anything but the most sedentary work. We took the position then, and we take it now, that a man untrained for anything but heavy physical labor at Luehr's age and with his disability could not be expected to find an occupation that would pay him anything but the most nominal sum.

The courts recognize the fact that a person whose occupation has been one of heavy labor is unqualified for other types of work. *Porello v. United States* (C. C. A. 2), 155 F. 2d 605, was a case of an injured longshoreman. The Court said, p. 608, "The man was incapable of any active work and there is no evidence that he had qualifications which might fit him for an office job."

Therefore, the damage award would have to be predicated upon this knowledge. We contend that Luehr's wage

loss during this 11 year period would amount to $49,500. That is based on contemplated earnings of $4,500 per year or $375 per month, a very reasonable figure based not only upon earnings in the industry but upon Luehr's own earnings in the year before the accident. In 1949, Luehr earned $4,252.07. [R. 286-287.] Part of 1949, Luehr worked in Alaska in the fishing industry, a lucrative employment to which he can never return.

Appellant argues that the loss of future earnings must be computed on the basis of work expectancy which it places at 12 years. The basic fallacy in this argument is that a working man does not ordinarily retire at age 65 or any other age for that matter, but works during his entire life time. This is being changed somewhat in the light of industry pension plans.

There is one now in the longshore industry which allows a man twenty five years in the industry to retire at age 65 with a lifetime pension of $100 monthly [R. 541] (which will undoubtedly increase with the passage of time) but Luehr will not now be able to qualify, although he would have been able to qualify had he not been injured. Luehr therefore has lost his chance of obtaining a pension. His inability to work means that he is no longer making social security contributions and he will suffer additionally on that score in smaller benefits when he reaches the age where he can claim social security benefits.

Martin Ingbrigtsen, Luehr's gang boss, testified that he was age 72 and still working as a longshoremen. [R. 539.] We think it fair to state that Luehr could be expected to work to that age or older. There are men in many walks of life, in the professions, business, and labor, who work until the seventies or eighties. A working man is

ordinarily less able to retire than those in other walks of life because he has never earned the kind of money which buys retirement.

There is no compulsory retirement age in the longshore industry for a workman in Luehr's situation. This Court recognized that damages are allowable until the retirement age. *Guthrie v. Southern Pacific Co.* (C. C. A. 9), 186 F. 2d 926, 927. There the retirement age was 70 years. *A fortiori,* if there is no retirement age, then damages are allowable on a basis of life expectancy.

That is the basis on which damages are computed in almost all cases of permanent disability. (*Cf. Guthrie v. Southern, supra,* p. 927.)

> "The previous conclusion as to present worth of the prospective earnings, were necessarily arrived at by a consideration not only of Guthrie's *life expectancy* but also of the earning power of money." (Emphasis ours.)

> "One who is injured in his person may recover for losses or diminution of his earning capacity *during his entire expectancy of life* and is entitled to such an amount as will compensate him for such loss. The proper element of damages in such case is loss of earning power, if any,—that is, the *permanent impairment of the ability to earn money.*"

> 15 Am. Jur., Sec. 91, p. 501.

> "Damages should include fair recompense for the loss of what (the plaintiff) would otherwise have earned in his trade, or profession, and has been deprived of the capacity of earning, by the wrongful act of defendant."

> *Vicksburg & Meridian R. R. Co. v. Putnam,* 118 U. S. 545, 30 L. Ed. 257, p. 258.

See also:

Pierce v. Tennessee Co. Iron & R. R. Co., 173 U. S. 143, L. Ed. 591;

De Vito v. United Airlines (D. C. N. Y.), 98 Fed. Supp. 88.

We contend that between ages 65 and 70, a period of 5 years, Luehr will lose in wages at least $3,000 a year, a total of $15,000. And then between ages 70 and 74, we contend that he will lose at least $2,000 a year or $8,000. We concede for the sake of this argument that his earnings would decline during his later years had he not been injured, although it could be argued (and the life expectancy cases are ample authority) that his earnings would continue at the full rate during his lifetime.

We conclude, therefor, that Luehr's wage loss for the period of his life expectancy is $78,000. We have not commuted the value of this wage loss because we have taken it on a declining earning basis.

If appellant wants to argue for a commutation, then the wages should be computed at the going rate in the industry at the time of trial, $100 per week or $5,200 per year. Over a life expectancy of 21 years the total wage loss would be $109,200 which commuted at 2% (rather than 3%, inasmuch as government bonds pay closer on the average to 2%, and bank interest on savings accounts ranges from 1% to 2%, and it cannot be argued that a man completely ignorant in finance such as Luehr can invest money successfully at 3%) would be $88,452.

At an interest rate of 2½% the commuted value would be $84,162 and at 3% the commuted value would be $80,158. The latter figure still is greater than the amount

we argued for on a diminishing earning basis at the commencing rate of $4,500 per year, namely $78,000. This Court indicated in the *Guthrie* case, *supra,* that it believed a 3% interest rate was proper. It is our view, as we have indicated, that a 2% interest rate is more nearly related to reality in a case such as this, but even if the 3% rate is taken, the figure which we finally come out with, based upon earnings in the industry at the *time of trial,* (which this Court indicated in the *Guthrie* case was proper) is larger by $2,000 than the amount we argued for at trial.

If the yearly wages were computed at $4,500 ($87 per week) the lifetime wage loss would be $94,500, which commuted at 2% would be $76.549, commuted at 2½% would be $72,882, and commuted at 3% would be $69,367. This latter figure is some $9,000 less than that for which we argued at the trial, and is the minimum figure which we believe would be allowable for loss of future earnings.

If Luehr's wage loss were computed at $3,400 per year (as the appellant desires) his wage loss over his life expectancy would be $71,400, which commuted at 2% would amount to $57,837, commuted at 2½% would be $55,029, and at 3% would be $52,411. This latter amount is still more than twice as much as the figure of $24,134 which appellant argues to be the maximum loss of future earnings. (Br. p. 38.)

The argument which appellant makes to this Court concerning wage loss was made by it to the trial Court, which found the argument unconvincing and rejected it.

It is improper to make deductions for income taxes or exemptions as appellant argues. Such deductions are too conjectural.

See:

Stokes v. United States (C. C. A. 2), 144 F. 2d 82;

Chicago & N. W. Ry. v. Curl (C. C. A. 8), 178 F. 2d 497, 502;

Cf. Guthrie v. Southern Pacific Co. (C. C. A. 9), 186 F. 2d 926, 928.

Furthermore, appellant makes no allowance at all for inflation and the depreciating value of the dollar. Dollar value has decreased steadily in the past twenty five years. One of the reasons that judgments in damage cases have increased is because the Courts recognize that a dollar will not buy today what it did twenty, ten, five or even two years ago.

> "The fact that the value of the dollar has greatly depreciated since the accident may be taken into consideration by the jury, in estimating the damages for personal injuries, and by a reviewing court in determining whether the amount awarded is excessive."
>
> 15 Am. Jur., Sec. 71, p. 481.

In *Naylor v. Isthmian S. S. Co.* (D. C. N. Y.), 94 Fed. Supp. 422, the trial Court judge, in upholding a verdict of $115,000, commented on the purchasing power of the dollar:

> "This then is the standard. I cannot find any intemperance, passion, partiality nor corruption on

> the part of the jury. It worked earnestly and intently on the case. *It had the right to consider the present purchasing power of the dollar.* It had no yardstick save its own cumulative conscience."

In *Kircher v. Atchison, Topeka & Santa Fe R. R.*, 32 Cal. 2d 176, 187, the Court said:

> "It is a matter of common knowledge and of which judicial notice may be taken that the purchasing power of the dollar has decreased to approximately one-half what it was prior to the present inflationary spiral and the trier of the fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained as the result of the injuries suffered."

On the question of pain and suffering, the argument presented to the trial Court was something like this: injuries of the extent and severity suffered by Luehr cannot be compensated for in mere money. It is at once apparent that no amount of money could compensate this man for the tremendous pain, suffering, agony and misery that he has endured, is still enduring, and will endure during the remainder of his life. We have said before, but we believe it bears repeating, that there are only very few cases where an injured worker suffered the kind of injuries Luehr suffered and lived to tell the tale. He is for all intents and purposes a bedridden and house confined cripple. The future offers no surcease from this situation. No amount of money will compensate this man for what this tragic accident has done to him.

However, the law says that there must be an award for pain, suffering, agony and the many other elements

which go to make up what we described as the emotional factors in this case.

"There is no standard for the admeasurement for damages for pain and suffering."

National Bulk Carriers v. Hall (C. C. A. 5), 152 F. 2d 658, 1946, A. M. C. 64.

"In an action for personal injuries, the plaintiff is entitled to compensation for his physical pain and suffering directly or resulting from the wrongful acts of the defendant, including pain and suffering incident to a surgical operation or medical treatment.

"Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for them must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate exercise. The award for pain and suffering must be limited to compensation. However, compensation in this connection is not to be understood as meaning price or value, but as describing an allowance looking toward recompense for, or made because of, the suffering consequent upon the injury. The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, shoud be allowed the plaintiff in addition to the other items of damage to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed. In making the esti-

> mate the jury may consider the nature and extent of the injuries and the suffering occasioned by them and the duration thereof." (15 Am. Jur., Sec. 72, pp. 481-483.)

This Court, in the *Guthrie* case, *supra,* itself recognized that there was no true measurement for damages on account of pain and suffering. The Court held that $40,000 for pain and suffering on account of the loss of a leg to a 58-year old railroad workman was too high, but held it was without power to revise the judgment.

In *Naylor v. Isthmian S. S. Co., supra,* $40,000 for ten hours pain and suffering was held not to be excessive. The seaman in the *Naylor* case died after ten hours of intense pain and suffering. In that case the Court said, 94 Fed. Supp., p. 424:

> "The pain inflicted on an individual which is caused by the wrongdoing of another is no less to a poor man than to a millionaire. It is most difficult to assess in the absence of intemperance, passion, partiality, or corruption—and there is none evident in this case—I am not one to say that terrific pain inflicted on a seaman for ten hours is not worth $40,000—when a jury of free men and women calmly, carefully and deliberately so decide."

See the same case on appeal, *Naylor v. Isthmian S. S. Co.,* 187 F. 2d 538, 541.

One must remember in this case that Luehr hovered between life and death for many weeks after receiving injuries in a type of accident which would have killed in 999 cases out of 1,000. Life saving methods were at first

employed. He suffered a tremendous concussion injury of the entire chest. He originally had a paralytic ilias, and cord symptoms, resulting in an incontinence of bowel and bladder. He had thrombo-phlebitis of both legs. Numerous blood transfusions and other life saving methods were employed. He was fed intravenously. He was administered constant drugs to relieve his pain. He did not know whether he was "coming or going."

He had a tremendous left leg injury, a compound comminuted fracture of the tibia, and two such fractures of the left fibula. The bones had to be wired together; they were shorn of skin and flesh. The osteomyelitis which developed did not respond to seven operations and the leg is so weak that it suffered a spontaneous fracture September last.

There was a tremendous compression fracture of the first lumbar vertabrae with anterior wedging, and posterior displacement about one-half inch into the spinal canal. We have already observed how remarkable it was that a permanent paralysis did not develop. Luehr suffered a complete derangement of the lumbo-sacral joint, and almost complete collapse of the interspace between the fifth lumbar and first sacral segments. There were fractures of the laminae, transverse and spinous processes of various lumbar vertebrae. The left leg is shortened by three-quarters of an inch.

There was an oblique fracture of the right clavicle; there was an avulsion fracture of the right astragalus.

There was a decalcification or demineralization of the bones of the left hip, right ankle, and left tibia. Traumatic arthritis has developed in the left hip.

When one contemplates this list of injuries—more than 20 bone fractures, and enormous injury to the nervous and venous systems and the soft tissues, one may get some small comprehension of the immense psychic and emotional shock that these injuries have produced upon Frank Luehr. That he has not collapsed completely emotionally is a tribute to his spirit and perseverence. None the less, these injuries themselves must tell the story of the pain and suffering this human being has undergone.

We have searched in cases in this circuit but we have found none where the injuries compared in magnitude or extent to those of Luehr. Certainly the injuries suffered by Guthrie in the loss of a leg were tremendous, but even that injury does not compare to what we have here. We realize that it is very hard to compare cases, and that the pain and suffering which one man may suffer will not trouble another, while in still another person it may be even more severe.

But in the law books and in the decided cases, it seems that the courts do make comparisons of cases and by comparison with any case we know, we assert without hesitation that the injuries to Luehr demand more by way of compensation for pain and suffering than any other case we know.

In the trial Court we argued that the pain and suffering which Luehr had undergone until the time of the trial justified damages in the amount of $35,000. We took the position that the injuries to the spine and back justifies damages at least in the amount of $15,000 and that the injuries to the left leg and hip justified damages in a further sum of at least $15,000. All the other injuries, we stated, justified damages of $5,000, making the total stated.

With regard to the future, we noted that Luehr had a life expectancy of 21 years. We argued that his damages for pain and suffering over his future lifetime would be at least $2,500 a year, or $52,000 over his life expectancy. This would amount to approximately $7.00 a day. Can anyone argue that $7.00 a day is too much to compensate one who must go through life the crippled and broken man that Frank Luehr is and will remain. Certainly, in the words of Judge Stephens of this Court, in the *Guthrie* case, 186 F. 2d p. 934, "There can be no monetary figure which really compensates for the loss of a limb and for the pain and suffering, both past and in the future, deriving therefrom."

In the light of the injuries suffered in this case, can it be stated that a total of $87,000 for pain and suffering, past and future, is too much? It is our view that both on the basis of the record in this case and by comparison to the decided cases, such a figure would be only reasonable.

However, it is at once apparent when one considers the total judgment of $125,000 that the trial Court did

not award any such figure as we asked for on account of pain and suffering. The damages, as we totalled them and argued our belief that the case justified them in the Court below, was the sum of $192,000. Judge Roche awarded some $67,000 less than we felt the evidence justified.

That verdict of Judge Roche is now under attack here by the Government as being excessive. It is our view that the judgment is not only not excessive but that it should be greater.

To summarize, the medical expenses as of the time of trial were $7,322.32. The future medical expenses will come to at least $12,000. The wage loss until the time of trial was $7,572. The medical expenses and wage loss therefore total approximately $27,000. That leaves $98,000 by way of general damages. The future wage loss must be at least $52,000 and more reasonably $78,000. If the former figure is taken as the wage loss, then the damages for pain and suffering in this case would amount to $48,000. If the latter figure is taken, then the damages for pain and suffering would amount to approximately $22,000. However one views the computations and money figures in this case, it is our belief that the award not only for future wage loss but for pain and suffering was most reasonable.

None of the amounts which go to make up items of general damages can be computed with mathematical certainty. Necessarily there are many variable factors which go into a consideration of these items. All that one

can do is to regard the case in its whole light to reach an equitable and fair conclusion.

The Government, in its brief, has cited cases (Br. pp. 45-55) attempting to demonstrate that the damages in our case were excessive. In none of those cases did the injured person suffer injuries or disability anywhere approaching or approximating that of Luehr. Every case must be decided on its own facts. None of the cases cited by the Government can affect the result here because none of those cases compare to this case.

On the other hand, there are many cases where damages were awarded in sums larger than in this case. See, for example:

Kieffer v. Blue Seal Chemical Co. (C. C. A. 3), 196 F. 2d 614. An award of $250,000 for third degree facial burns, blindness, except for 25% vision in one eye, and a permanently disfigured face;

Summerville v. Smucker, 113 N. Y. S. 2d 868, judgment for $195,888, reduced by remittitur to $100,000, a death case;

Nives v. City of New York, 109 N. Y. S. 2d 556, verdict for $160,000, serious leg and other injuries;

De Vito v. United Airlines, supra, verdict of $300,000, cut to $160,000, death case;

Florida Power & Light Co. v. Watson (Fla.), 50 So. 2d 543, $260,000 damages for crushed pelvis, severance of urethra and other severe injuries;

Smith v. Illinois Central R. R. (Ill. App.), 99 N. E. 717, $185,000 damage verdict, loss of both legs mid thigh, back injury, other injuries;

Trobridge v. Simonds Abrasive Co. (C. C. A. 3), 190 F. 2d 825, verdict for $126,182.44. Forty-four year old plaintiff suffered severe leg injuries when an abrasive wheel shattered; he was hospitalized for 14 months and amputation of one or both legs remains a possibility;

Sunray Oil Corp. v. Allbritton (C. C. A. 5), 187 F. 2d 475, $125,000 verdict for roustabout with serious back and lung injuries sustained when an oil derrick collapsed.

There are many other cases reported and unreported wherein what are seemingly large judgments have been awarded and paid, or sustained on appeal. Naturally all of those cases, as our case, stand on their special facts. For a review of many such cases see 10 N. A. C. C. A. Law Journal, pages 265-283; 9 N. A. C. C. A. Law Journal, pages 247-264; 8 N. A. C. C. A. Law Journal, pages 230-241; 7 N. A. C. C. A. Law Journal, pages 221-231; 6 N. A. C. C. A. Law Journal, pages 198-211.

On the basis of not only the record in this case but also many comparable cases in other jurisdictions, we conclude that the verdict rendered by the trial Court in this case was not excessive.

IV.

The Verdict Not Being the Result of Passion or Prejudice, and Being Supported by Substantial Evidence, the Appellate Court Will Not Substitute Its Judgment for That of the Trial Court.

It is true that this is an appeal in admiralty, and this Court may consider the case *de novo*. However, there is a long line of cases in this circuit holding that where the trial Court has heard the witnesses in person (as occurred here, except for the witness Bailey on the liability question) it will not interfere with the trial Court's decision where it is based upon substantial evidence and the findings are not clearly erroneous. (*Kulukundis v. Strand* (C. C. A. 9), No. 13229, decided March 10, 1953, and cases therein cited.

On the liability question, it offers no argument but that the Government was negligent, and the record is abundant that the appellee Luehr was free of contributory negligence. On this score, there is no basis to alter the result reached below.

On the anti-subrogation point, that the Government is entitled to a credit for compensation paid to and medical attention provided Luehr by his employer's compensation carrier, it is evident that the trial Court preserved the Government's right to litigate that question in another proceeding, inasmuch as it was neither raised by the pleadings or litigated in this case. The trial Court gave Luehr a lump sum award, and the Government did not object to such a procedure. The monies paid Luehr by the compensation carrier were not necessarily considered by the trial Court in reaching its verdict. Accordingly,

that question is not before this Court on this appeal. Furthermore, the Government is not in a position to relieve itself of a liability because a third person may have paid monies which it otherwise must pay.

That leaves the damage question. This Court in the *Guthrie* case, *supra,* held that in a law case it was without power to require a new trial, and therefore without power to issue a remittitur reducing damages. It would seem that the principles controlling here should be no different. "A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damages is capable of much more precise ascertainment than it is in a personal injury case." *Guthrie v. Southern Pacific Co.,* 186 F. 2d at p. 928.

In an admiralty appeal, *Carroll v. United States* (C. C. A. 3), 133 F. 2d 690, 1943 A. M. C. 690, the Court held it would not reduce a damage award even though it was larger than that Court would have made.

Cf.:

Pariser v. City of New York (C. C. A. 2), 146 F. 2d 431, 1945 A. M. C. 133;

Southern Ry. Co. v. Bennett, 233 U. S. 80, 58 L. Ed. 860;

Miller v. Maryland Casualty Co. (C. C. A. 2), 40 F. 2d 463.

We submit that this case is one where the Appellate Court should not substitute its judgment for that of the trial Court. The case was fairly tried below, there was substantial evidence to support the verdict on every aspect of the case, and there is no basis for reversal.

V.

The Damages Should Be Increased on Appeal.

"An appellate court may increase an award in admiralty."

Porello v. United States (C. C. A. 2), 153 F. 2d 605, p. 608.

See also:

Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146, 69 L. Ed. 890;

The Spokane (C. C. A. 2), 294 Fed. 240, cert. den., 264 U. S. 583;

Drowne v. Great Lakes Trans. Corp. (C. C. A. 2), 5 F. 2d 58.

In the preceding discussion concerning damages, we pointed out that we had asked the trial Court for an award of $192,000. We think such an award is justly deserved by the evidence as reviewed herein.

However, since the trial, developments have occurred which justify an increase in the award. Luehr suffered a spontaneous fracture of the left tibia at the old fracture site in September, 1952, approximately six months after the trial. He was treated by Dr. Walker for that new fracture. He was in Merritt Hospital from September 4 until September 11, 1952, where a closed reduction was accomplished and a long cast was applied (see *infra,* p. 51, report of Dr. Harry R. Walker of November 3, 1952).

As of March of this year, one year after the trial, Luehr's most recent leg fracture is not yet healed and he is still recuperating (see *infra,* p. 53, report of Dr. Harry R. Walker, dated March 17, 1953).

It becomes apparent at once that Luehr not only has not recovered from the leg injury but that it has become worse. From Dr. Walker's report it will be noted that the patient's other injuries are without improvement.

Luehr has endured greater pain and suffering since the trial than was anticipated. The operation on his spine has not yet been performed and the terrific back pain still remains. It cannot be stated with any certainty when the spinal operation can be performed.

The medical expenses since the trial have amounted to $4,740.88—almost $5,000. At the trial it was estimated that future medical expenses would be $12,000. It is apparent that this estimate was too conservative.

It is also apparent that Luehr will not do any kind of work in the future, even the most sedentary. We believe, therefore, that an award of damages in the amount of $192,000, as requested in the trial Court, is proper and that such an award should be made by this Court on appeal.

Conclusion.

For all of the reasons stated in the foregoing brief, it is our belief that the judgment on liability should be affirmed, that the anti-subrogation point is without merit; that the damages awarded below are not excessive; and that there should be an increase in damages awarded on this appeal.

Dated: May 15, 1953.

Respectfully submitted,

HERBERT RESNER,

RAOUL D. MAGANA,

Proctors for Appellee Luehr.

Motion for Leave to Take New Testimony on Appeal. (Admiralty Rules 7 and 8)

To the Judges of the above entitled Court and to Messrs. Keith R. Ferguson, Special Assistant to the Attorney General, and J. Stewart Harrison, Attorney, Department of Justice, Attorney for Appellant:

Appellee, Frank Luehr, prays leave of Court to have additional testimony and new evidence taken on this appeal on the questions of appellee's physical condition, medical treatment, present opinions of the doctors as to his physical condition and future course, and damages with regard to medical expenses.

This motion is based upon the entire record in this case and upon the affidavit of Herbert Resner, proctor for appellee, Frank Luehr, filed herewith.

Wherefore, appellee prays that this Court issue an order to appellant to show cause why such evidence should not be received on this appeal.

Dated: May 15, 1953.

HERBERT RESNER,
RAOUL D. MAGANA,
Proctors for Appellee Luehr.

Affidavit of Herbert Resner.

State of California, County of Los Angeles—ss.

Herbert Resner, being first duly sworn, deposes and says:

I am one of the proctors for appellee Frank Luehr. Since the trial in this case Frank Luehr has suffered several physical relapses, particularly a refracture of the left leg in September, 1952. In that connection affiant attaches hereto, and makes a part of this affidavit, a report of Dr. Harry R. Walker, Luehr's treating physician, dated November 3, 1952, and marked Exhibit "A"; and a report of Dr. Harry R. Walker, dated November 17, 1953, and marked Exhibit "B".

Affiant is informed by his client that the medical expenses since the trial amount to a total of $4,740.88. Those bills are for hospital treatment, doctor's services, medicines, X-rays, and other medical expenses.

Luehr was a patient in Merritt Hospital from March 25 through May 3, 1952; and again, from September 4 through September 11, 1952. Dr. Walker's bills are attached hereto as follows: November 3, 1952, Exhibit "C," and March 17, 1953, Exhibit "D."

Wherefore, affiant prays that this court order the taking of additional testimony on the matters specified herein.

HERBERT RESNER,
Proctor for Frank Luehr.

Subscribed and sworn to before me
this 19th day of May, 1953.

BETTY LEE RESNER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 19, 1955.

EXHIBIT A

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

November 3, 1952.

Law office of
Mr. Herbert Resner,
458 So. Spring Street,
Los Angeles, California.

Dear Sir:

Re: Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

The above-captioned patient has continued to report to this office regularly since our last conference. About September 2nd or 3rd, however, the patient was at home and re-fractured the left leg at the site of his old fracture. He was taken by ambulance to the Merritt Hospital, where a closed reduction was accomplished and a leg cast was applied. He was dismissed from the hospital on 9-11-52 and has carried on his convalescence at home. On 10-13-52, the cast was changed, and check X-rays were taken by Dr. Herman Jensen, which revealed that there appears to have been a recent fracture through the extreme distal end of the old comminuted proximal shaft tibial fracture with some anterior medial bowing at the fracture site. The fibula at the corresponding level reveals

nonunion with smooth terminal margins. The fracture through the distal fibula, which is well united and retrabeculated with a spur is visualized. The articulating surfaces at the knee joint appear smooth with some deossification present.

At present the extremity is encased in a long leg walking cast and the patient is ambulatory on crutches. If given more time, this fracture will unite.

Insofar as his other injuries are concerned, there is no change in them since our last conference, and his permanent disability has not changed any. As to the present fracture, it would be my opinion that this will require another two or three months before it will be united solidly.

Very truly yours,

HARRY R. WALKER, M. D.
Harry R. Walker, M. D.
Douglas D. Toffelmier, M. D.

HRW FS

EXHIBIT B

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

March 17, 1953.

Mr. Herbert Resner,
Attorney at Law,
Suite 329 Rowan Bldg.,
450 South Spring Street,
Los Angeles 12, California.

Dear Mr. Resner: *Re: Frank Luehr.*

This will acknowledge receipt of your letter of 3-13-53. The recent fracture of the left tibia has slowly united so that there is now sufficient callusto allow for full weight bearing and the patient is able to get around with the aid of a brace and cane. It would be my opinion that he will require another three to four months before there will be solid bony union.

Check X-rays taken of the left extremity on 3-6-53 were interpreted as follows:

Again the old fractures through the proximal shafts of tibia and fibula with the re-fracture through the more distal part of the fracture bed of the tibia is demonstrated. There has been no apparent change in alignment and relationship so far as memory serves. Considerable callus is developing in the recent fracture bed and more in the old

fracture bed. Non-union still persists in the proximal fracture of the fibula. The oblique fracture through the distal fibula is well healed and retrabeculated.

The patient's other injuries are much the same as disclosed in our previous reports.

Very truly yours,

HARRY R. WALKER, M. D.
Harry R. Walker, M. D.
Douglas D. Toffelmier, M. D.

HRW FS

EXHIBIT C

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.
354 Twenty-first Street
Oakland 12, California

March 17, 1953.

Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

For services rendered as follows:

Previous billings as reported to Mr. Herbert Resner, Attorney at Law, Suite 329 Rowan Bldg., 458 South Spring Street, Los Angeles 13, California, through October, 1952			$434.75
11-7-52	Office Visit		5.00
11-17-52	"	"	5.00
11-19-52	"	" and application of long leg cast	17.50
11-22-52	"	" " adjustment of cast	7.50
12-2-52	"	" " window and padding of cast	7.50
12-9-52	"	"	5.00
1-6-53	"	"	5.00
1-20-53	"	" removal of cast and appl. of boot	11.50
2-2-53	"	"	5.00
2-9-53	"	" and ace bandage	6.50
2-20-53	"	"	5.00
3-6-53	"	"	5.00
			$520.25

Copy to Mr. H. Resner

EXHIBIT D

Douglas D. Toffelmier, M. D.
Harry R. Walker, M. D.

354 Twenty-first Street
Oakland 12, California

November 3, 1952.

Law Offices of
Mr. Herbert Resner,
458 So. Spring Street,
Los Angeles, California.

For account of Mr. Frank Luehr,
2529 Grove Street,
Oakland, California.

The following is a statement of the above account since April, 1952, which remains unpaid to date:

Services 4-25-52 through 5-27-52 (previously submitted)	$184.00
Services 6-2-52 through 6-24-52 (previously submitted)	34.50
7-1-52 Office visit and ace bandage	6.75
7-11-52 " " " " "	5.00
7-16-52 " " " " "	6.75
7-22-52 " "	5.00
8-7-52 " " " " "	6.75
8-26-52 " "	5.00
9-3-52 " "	5.00
9-4-52 Surgery—Merritt Hospital—Refracture of leg.	100.00
9-5, 6, 7, 8, 9, 10, 11 Hospitals visits (7 @ $5.00)	35.00
9-16-52 Office Visit	5.00
9-30-52 " "	5.00
10-13-52 " ", removal of cast and reapplication	17.50
10-17-52 " " and application walking heel	8.00
10-28-52 " "	5.00
Total to date.	$434.75

No. 13,562

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK LUEHR, and JONES STEVEDORING COMPANY, a corporation,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF OF THE UNITED STATES.

LLOYD H. BURKE,
United States Attorney,
KEITH R. FERGUSON,
Special Assistant to the Attorney General.
J. STEWART HARRISON,
Attorney, Department of Justice,
447-A Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,562

IN THE

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On Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF OF THE UNITED STATES.

In reply to the separate briefs filed by appellee Jones Stevedoring Company and appellee Luehr, the points raised by Jones Stevedoring Company will be discussed first followed by discussion of the points raised by appellee Luehr.

THE GOVERNMENT'S CONTRACTUAL RIGHT OF INDEMNITY FLOWS FROM THE NEGLIGENCE OF LUEHR AND OTHER EMPLOYEES OF JONES STEVEDORING COMPANY.

The undisputed testimony shows that Luehr placed himself beneath a suspended load in violation of the

Safety Code. According to the uncontradicted testimony the employees of Jones Stevedoring Company permitted Luehr to thus violate the Safety Code and failed, when the opportunity was present, to warn him of the danger and order him out from beneath the plane prior to the time they knew the whistle signal was to be given for moving the suspended load. These acts of negligence are glaringly apparent in the light of the admitted fact that Luehr was the only man injured out of the whole stevedoring gang who were assisting in steadying the plane. He was the only man who went beneath the suspended plane. The other members of the gang performed the same job of steadying the plane by merely placing their hands on the wings.

It is uncontested that, under the terms of the contract between Jones Stevedoring Company and the Government, negligence on the part of Luehr, or any one of the employees of Jones, requires Jones Stevedoring Company to hold the Government harmless. There is no suggestion that any other interpretation of the contract is possible.

IT WAS NOT NECESSARY FOR LUEHR TO BE UNDER THE SUSPENDED LOAD, IN THE POSITION THAT HE WAS AT THE TIME OF HIS INJURY.

Counsel for appellee Jones Stevedoring Company contend that it was *necessary* for Luehr to be under the airplane to do his job.

Necessity implies a reason. No reason is suggested.

The testimony is clear that the only job Luehr was attempting to do was the job of steadying the plane from swinging. He testified that this was so, as follows (R. 357):

"Q. I interpret your testimony to be, you were up there to steady the airplane?

A. That is right.

Q. Did you have the platform with you that was going to go underneath the wheel?

A. The platform already was underneath there.

Q. Did you have the bolts with you that they needed in fastening the landing gear to the platform?

A. No, sir.

Q. *Were you going to fasten it?*

A. *No, sir.*

Q. *You were there to steady it, is that right?*

A. *That is right.*"

The testimony and the physical facts prove that the plane could be steadied by standing away and taking hold of the wings. The other stevedores who were also steadying this same airplane were doing so by placing their hands on the wings. (R. 355.)

Mr. Luehr himself testified that he himself had previously done the job of steadying other airplanes by merely placing his hands on the end of the wing. He testified (R. 355):

"Q. I see. Then each time a plane was landed, would some of the men take hold of the end of the wing as you say?

A. That is right.

Q. And you had done it on prior occasions?
A. Oh, yes."

The only time it was necessary to go underneath the airplane was when it was spotted directly over the platform. At this time the tripod had to be placed squarely on the platform and the bolts affixed. At this time there was practically no danger of injury if the plane fell, for it would only fall a few inches, and would then rest upon the platform with the wings and the body supported by the landing gear.

Counsel for Jones have attempted to cite to the Court testimony to the effect that it was necessary to go under the plane, and thereby excuse the negligence. All of this testimony relates to a time when the plane *was spotted* over the platform. The testimony is unanimous to the effect that *there is no necessity* for being underneath the plane before it is spotted over the platform.

All of the testimony of Mr. Spirz which they have quoted in their brief in connection with this point refers to a time when the plane was spotted over the platform. With regard to the precise time of the injury, Mr. Spirz testified:

> "Now, because we have to move the plane over the foot or so, nobody was getting underneath to move the platform or the movable beams." (R. 191.)

Every expert called testified that there was no necessity of being under the airplane until the landing gear was spotted over the platform. On pages 20 and

21 of the Government's opening brief the testimony of these experts is excerpted for the convenience of the Court.

In addition to the testimony quoted in the opening brief, there is the testimony of another expert called on behalf of Jones Stevedoring Company which was as follows (R. 637):

> "Q. Mr. Moore, is it necessary to grab hold of this strut before the landing gear of the plane arrives at a spot directly over the platform?
>
> A. Well, all the planes I have worked on, when these fellows brought it over to us, *always directly over before we got hold of it.*"

Since these experts were called by appellee Jones they are bound by this testimony. (32 *C.J.S.*, page 1104.)

It is to be noted that appellee Jones chose to ignore the testimony of their own experts in presenting their brief to the Court.

The only support that could be found for the contention that it was necessary to go under the plane prior to the time the landing gear was spotted was the testimony of a young lawyer, Timothy O'Brien, who claimed to have had some familiarity with these airplane loading procedures some ten years ago. Even this testimony which appellee apparently deems to be helpful makes it clear that there was no necessity to go under the plane to steady it, for, as quoted on page 18 of appellee's brief, Mr. O'Brien testified:

> "There were two reasons you had to go under, one was to line it up so they are square on the

platform, and secondly, the tripods weren't perfectly balanced, so that if you didn't exactly set them in line as you dropped it onto the deck, the natural result it would come up with a little angle one way or another."

Nowhere in this original statement did he say it was necessary to go under the plane to steady it.

It is to be noted that the man who was Mr. O'Brien's superior at the time he was engaged in this type of work was Mr. Nystrom. (R. 671.)

Mr. Nystrom testified as follows (R. 524):

"Q. But to be—to make it clear, to the best of your knowledge, it is not necessary for a man to go under there to do anything with the tripods until it arrives over that platform, is that right?
A. Yes."

It is contended by counsel for Jones that at the time Luehr went underneath the airplane, it had to be moved only a "little bit". The testimony is clear that it was two to three feet away from the spot directly above the platform, and that it had to be swung inboard and aft to reach the spot above the platforms.

The fact is, the reason the derrick barge is used is that it is a precision instrument capable of spotting these planes with great accuracy. It is used because it has precision which the ship's own gear does not. (R. 232-233.)

The testimony also showed that in still waters such as where the SHAWNEE TRAIL was docked it is customary to lower the plane to within a foot to three or

four inches of the platform before the men go underneath to attach the tripods. Mr. Holbrook, one of the experts called by appellee Jones, indicated that in a sheltered harbor or cove they would lower it to within three inches. (R. 629.)

Mr. Davis, the safety expert who aided in promulgating the Pacific Coast Marine Safety Code, and a witness called by appellee Jones testified that the Safety Code requires, *"That the men stand clear until the whistleman has landed or spotted that load as near as possible over the point where he intends to land it permanently."* (R. 693.)

It is abundantly clear that the load was not spotted over its permanent resting place and it still had to be moved several feet so that the landing gear would be over the platform.

Consequently, by the testimony of the stevedores' own safety expert, Luehr was under the load in violation of the Safety Code.

From the foregoing it is clear that there is no necessity of being under the airplane to steady it, or for any other reason, prior to the time it is spotted directly above the platform. From the facts it is clear that the airplane had not arrived over the platform at the time Mr. Luehr went underneath, hence his going underneath was unnecessary.

IT WAS NOT PROPER FOR LUEHR TO BE UNDER THE AIRPLANE AT THE TIME OF HIS INJURY.

Counsel for appellee Jones state that Mr. Luehr's position was necessary and *proper*. The foregoing section shows it was not necessary. *It was also improper.*

With regard to negligence, for an act to be proper, it must be an act which does not fall below the standard of care to which the actor must conform for his own protection. The Stevedoring Unions have not let this standard of care remain a matter for idle speculation; they have promulgated a set of rules which by its own terms sets up the minimum requirements for safety of life or limb. (Rule 102, Pacific Coast Marine Safety Code, Government's Exhibit A.)

Counsel for appellee attempt to persuade the Court that because the rule prohibiting men from going under suspended loads uses the term "sling load" it does not apply to other types of suspended loads. One witness is quoted as having stated the rule did not apply in this case because the load in this case would be defined as a "lift load". (R. 669.)

This absurd distinction was not recognized by the stevedore boss who testified as to his interpretation of the code—"It says a man shall not stand under a load." (R. 164.)

The obvious intention of the rule is to prohibit men from standing beneath suspended loads in order to avoid injury should the load be dropped.

By this thinly veiled evasion, counsel would have us believe that the stevedores' own Safety Code does

not apply in any case involving a "lift." Should a steamship owner attempt to make stevedores work under a suspended "lift load" by saying that their safety rule applies only to "sling loads," the Court can be assured the cargo would not be loaded. The stevedores themselves would scoff at such a proposition the same as this Court will certainly do.

It is therefore apparent that Luehr's being under a suspended load is a violation of the stevedores' own Safety Code. Certainly it is conduct falling below the standard of care required for safety of life and limb, and hence *improper.*

Not only was it negligent conduct on the part of Luehr himself, but there was also negligence on the part of the stevedore foreman for failing to warn Luehr to remove himself; especially in view of the fact that the foreman knew that the plane was about to be moved. As the Court stated in *Barbarino v. Stanhope S. S. Co.* (C.A. 2d 1945), 151 F. (2d) 553, cited in the Government's opening brief: "It was possible to avoid all danger at that time by merely warning men to get out of the way. * * * Considering that if it did fall, the man would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means."

THE DISTRICT COURT'S FINDING THAT LUEHR WAS IN A NECESSARY AND PROPER PLACE WAS NOT A FINDING OF FACT BASED UPON A CONFLICT IN THE TESTIMONY, BUT WAS ERRONEOUS IN THAT THERE WAS NO TESTIMONY IN SUPPORT THEREOF.

The Court of Appeals should reverse where there is no evidence to support a material finding of fact. As the Court of Appeals in the Fourth Circuit stated in the *Columbia L. C.,* 26 F. (2d) 583, 1928 AMC 1211, at page 1214:

> "Where the trial judge is clearly wrong in his conclusion of fact, and where there is no evidence to support the same, it is the duty of the Appellate Court to reverse that finding."

Counsel for appellee have cited several cases in support of the contention that violation of a company rule is not negligence *per se,* but the question of standard of care is a factual one for the jury to determine. In citing these cases, counsel has chosen to ignore the fact that this case was not decided by a jury. The distinction between jury cases and court cases with regard to findings relative to the standard of care was pointed out by the Court of Appeals for the Second Circuit in *Barbarino v. Stanhope S. S. Co.* (supra). The quotation from the Government's opening brief is repeated for the convenience of the Court:

> "It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is conclusive upon it as it is upon any other question. For the jury is deemed—rightly or wrongly —to be as well qualified to set such a standard as a judge. But where the decision is that of a

> judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law,' strictly so called." (Citing cases.)

It is obvious, therefore, that the cases cited by counsel for appellee are not applicable to the situation before this Court.

With regard to the negligence of Mr. Spirz, the foreman on the job, and an employee of Jones, there was little or no dispute about the three following facts:

(1) He failed to give any instructions to his men with regard to the loading of these airplanes, despite the fact that Luehr had never worked on a mechano deck, doing an operation of this kind, before undertaking the loading of this particular ship. (R. 320.) Such instruction is specifically required by the Pacific Coast Marine Safety Code, Rule 206(c). (Government's Exhibit A.)

(2) Although he knew Luehr was underneath the wing of the airplane, because he saw him there (R. 182), he failed to warn him to get out from under at the time the signal was given to move the plane.

(3) By his testimony it is shown that he not only failed to warn, but that he in fact condoned an obvious violation of the Safety Code (R. 183) which it is his duty to enforce. (Government's Exhibit A, Rule 206.)

The question that remained for the District Court was to determine whether or not these facts conformed to the standard of care required of stevedores for the protection of their men. The answer is obviously a conclusion of law which is clearly subject to review by this Honorable Court.

FAILURE TO CALL THE WHISTLEMAN OR A WITNESS RAISES NO PRESUMPTION AGAINST THE GOVERNMENT.

Counsel for appellee Jones have contended that the Government's failure to call the derrick barge "whistleman" raises a presumption that his testimony would have been unfavorable. In this connection, two things are respectfully called to the attention of the Court. First, there is no allegation, nor is there any contention that there was anything wrong with the whistle signals, or that anything this man did, or did not do, in any way contributed to the accident; therefore he could not be termed a material witness. He was merely another observer, insofar as the accident is concerned, and therefore his testimony would have been merely cumulative.

The absent witness rule was discussed by the Court of Appeals for the Fourth Circuit in the *Oregon—New Mexico,* 175 F. (2d) 632, 1949 AMC 1120, at page 1126, as follows:

> "Counsel for libellants lay great stress on the failure of the United States to call as witnesses certain specifically named persons: Lieutenant Gentry and quartermaster's striker Hoover of the

> NEW MEXICO and Lieutenant Moyer of the HUGHES. The District Court recognizing the general principle that 'when a litigant fails to offer witnesses who are available a court may draw the inference that their testimony would not be helpful,' went on to hold: 'But when there are a dozen witnesses to an event and two of them are not called to testify, I know of no authority which compels a court to discredit entirely the testimony of the other ten.' We must sustain that ruling under the circumstances of this case."

Secondly, it is to be noted that counsel for appellee Luehr called this man as their own witness at the time of taking his deposition. When the District Court ruled the deposition was not admissible, since there was no showing that the witness was absent from the jurisdiction, counsel for appellee Luehr was instructed by the Court, "Since he is available, produce him." (R. 282.) Thereafter, counsel for the Government volunteered to aid Mr. Resner (counsel for Luehr) in locating the witness. Counsel for the Government assumed Mr. Resner would follow the instructions of the District Court. The witness was offered to appellees and they failed to call him. If there be a presumption at all, it should be against appellee Luehr.

THE AUTHORITIES CITED BY THE GOVERNMENT'S OPENING BRIEF ARE DIRECTLY IN POINT.

Counsel for appellee Luehr stated that all the Government's authorities are distinguishable on the facts. It is submitted the authorities cited clearly establish the following points:

(1) There can be more than one proximate cause of an injury.

(2) That where there is a safe way to do a job and a dangerous way, it is negligence to employ the dangerous way.

It is obvious from the facts of this case that there was a safe way to steady the airplane, i.e., by placing hands upon the wings and standing clear of the suspended load.

Other men were doing the job safely at the time the plane fell and were not injured. In fact, the only man in the stevedore gang who was injured was Luehr, and that was by reason of the fact that he was the only one under the plane.

The expert testimony was conclusive that the way to do the job was by holding onto the wings.

Luehr himself testified that that was the way he had done it on previous occasions.

There was also a dangerous way to steady the plane. This was to go under the plane and grab the landing strut. It was conclusively shown there was no necessity of doing this to steady the plane.

Luehr chose the dangerous way. Such a choice constituted negligence. 65 *C.J.S.*, Section 122, and cases cited thereunder.)

The fact is uncontested, that under the terms of the contract between Jones Stevedoring Company and the Government, negligence on the part of Luehr, or any one of the employees of Jones, requires Jones Stevedoring Company to hold the Government harmless by way of indemnity.

Such negligence has been clearly proven and consequently it is respectfully submitted that the decree dismissing Jones Stevedoring Company should be reversed and the United States be granted full indemnity from appellee, Jones Stevedoring Company.

REPLY TO BRIEF OF APPELLEE LUEHR.

Because the brief on behalf of appellee Luehr is primarily designed to appeal to the sympathies of the Court, there is little need for a reply. No one contends that Mr. Luehr is not deserving of every sympathy nor that he did not suffer severe and painful injuries.

No attempt was made to "deprecate" or "minimize" Luehr's injuries as implied by his counsel. This is shown by the very fact that counsel for the Government presented to the District Court findings identical with those presented by Luehr's counsel in this regard. It is emphasized by the fact that the entire list of injuries is set out in the Government's opening brief, without omission or diminuation. The fact is there was a substantial physical recovery. The

prognosis was good, and the permanent disability was not total.

In what perhaps may be termed an overabundance of caution, the following brief observations are made.

APPELLEE LUEHR WAS NOT FREE OF NEGLIGENCE.

The question of the negligence of Luehr and his employer, Jones Stevedoring Company, has been thoroughly covered in the Government's opening brief and in the foregoing portion of this brief in reply to the brief of appellee Jones.

Only one new thought has been suggested by counsel for Luehr. On page 5 of their brief it is contended that Luehr did not go under the airplane. This contention has never before been raised, is entirely disproven by the physical facts and the testimony. All the witnesses agreed the plane fell straight down. If Luehr wasn't under the load, how did he get hit?

CLARIFICATION OF THE ISSUES.

Counsel for Luehr have cited numerous cases in the opening portion of their brief intended to show there is liability on the Government for the negligence of its employee. There is no contention to the contrary.

The fact is that the Government is entitled to be indemnified for any loss as a result of this liability by virtue of its contract with Jones Stevedoring Company. The contract provides that Jones must indemnify the United States for any loss resulting from personal injury occasioned "either in whole or in part

by the negligence" of Jones, "its officers, agents, or employees". It has been proven that the accident was caused in part by the negligence of employees of Jones, and that Luehr was one of the negligent employees.

The further fact is that the damages resulting from this accident should be reduced by virtue of the contributory negligence on the part of Luehr himself.

THE SUMS ALREADY PAID BY WAY OF COMPENSATION AND MEDICAL EXPENSES MUST BE CREDITED TO ANY AWARD TO THE LIBELANT.

This point was thoroughly covered in the Government's opening brief.

Counsel for Luehr in their brief have quoted at pages 14 and 15 portions of the record in an attempt to mislead this Court into believing that the award of $125,000 did not include special damages for loss of wages and hospital expenses, however they have entirely ignored the District Court's final finding in this regard wherein it is stated:

> "It is true that as a result of the injuries sustained by libelant as found herein, and by virtue of his permanent disability, pain and suffering, *and his general and special damages,* the Court finds that he has suffered and been damaged in the *total sum* of $125,000." (R. 68.) (Emphasis ours.)

It is elementary that since no cross-appeal has been taken, appellee Luehr cannot attack this finding.

Counsel for Luehr virtually concede that the items already paid should be credited to the award under

the authority of *Palardy v. United States* (E.D. Pa.), 102 F. Supp. 534, but seek to escape the result by saying the matter was not properly raised before the District Court.

Examination of the record will show that evidence with regard to the anti-subrogation agreements was taken extensively. (Testimony of Elzey, R. 542-554.) The certificates of insurance containing the provision were introduced into evidence and read into the record. The matter was argued extensively throughout the trial as the record shows, and also in the final arguments. Failure to credit these amounts to the award is cited as error. (R. 78-79.) The evidence is before this Court and the question has been briefed. It is respectfully submitted that the question was properly before the District Court and is properly before this Court.

To fail to credit the amounts paid by way of compensation and medical payments would result in double payment for the same loss. Such double payments are to be avoided. As the Court stated in *McCarthy v. American Eastern Corporation,* 195 F. (2d) 727, "For in Admiralty, as elsewhere in the law, a litigant may not recover compensation for a single claim, more than once."

In the alternative, failure to credit these amounts on the theory that Luehr must repay his employer for the amounts advanced, would be nothing more than condoning a violation of the express terms of the waiver of subrogation agreement wherein Jones has

expressly waived the right to recover these payments when the third party is the United States.

The $10,404.52 should be credited to any award in favor of Luehr. In fact, any amounts subsequently paid by way of compensation and medical expense must be credited to any award.

EXCESSIVENESS OF DAMAGES.

The true facts with regard to Luehr's actual loss of wages, and his anticipated loss of wages are set out in the Government's opening brief. The computations presented by Luehr's counsel are based on pure speculation and unwarranted assumptions. They are computed on a theory that had the injury not occurred, Luehr would have worked and earned more than he had ever earned before for the entire period of his life expectancy. The Courts have uniformly refused to accept this theory as shown by the cases cited in the Government's opening brief.

Counsel for Luehr have argued that the award in this case is not excessive because there have been higher awards in other cases. They cite eight cases of higher awards. They fail to state the age of the plaintiff in those cases, or the earning capacity. These two factors, of course, must govern the reasonableness of the award.

Luehr was 53 years old at the time of his injury. He had 12 years of working expectancy. His highest

yearly earnings prior to the accident were $4,252.07. (R. 286-287.) His average for three years past was approximately $3,400.00 a year.

Compare these facts with the facts, insofar as obtainable, of the cases cited by counsel for Luehr in their brief, pages 43 and 44.

Keiffer v. Blue Seal Chemical Co. (C.C.A. 3), 196 F. (2d) 614, 107 F. Supp. 288.

This case involved a 36-year-old plumber who was totally disabled and grotesquely disfigured. No previous earnings are quoted, but the working expectancy was *29* years, and the permanent disability, by reason of the total disfigurement, was much greater.

Summerville v. Smucker, 113 N.Y.S. (2d) 868 ($100,000.00). No facts as to earnings or working expectancy are reported. The Court stated $195,888 was grossly excessive and reduced to $100.000.00.

Nives v. City of New York, 109 N.Y.S. (2d) 556 ($160.000.00). This case has no facts reported as to age and earning capacity. Counsel for Luehr cite the case in support of $160,000.00 award. The fact is the case was reversed unless the plaintiff consented to reduction to $125,000.00. Counsel failed to mention this fact.

DeVito v. United Airlines, 98 F. Supp. 88 ($160,-000.00). In this case the previous earnings were $9,038.12 a year. The plaintiff was 38 years of age and had a working expectancy of 27 years. The Court commented that earnings of twenty to twenty-five thousand a year were reasonably within the realm of probability.

Florida Power & Light Co. v. Watson (Fla.), 50 So. (2d) 543 ($260,000.00). It is difficult to understand how counsel can cite a lower Court's decision in support of their contention, when the Appellate Court reversed the decision, on the same grounds upon which the Government urges reversal here. In the cited case, the Court of Appeals reversed for a new trial "by determining that the jury's verdict of $260,000 *is so grossly excessive as to shock the judicial conscience*". And yet counsel cite this case in support of a verdict of $260,000.00.

Smith v. Illinois Central R. R., 99 N.E. (2d) 717 ($185,000.00). In this case (reported at 99 N.E. (2d) 717, not 99 N.E. 717, as cited by counsel for Luehr) the plaintiff was only 24 years old with a working expectancy of 31 years. At this young age plaintiff was making $2,860 a year.

Trowbridge v. Simonds Abrasive Co. (C.C.A. 3), 190 F. (2d) 825 ($126,182.44). In this case the age of the plaintiff was 44 years. He had a working expectancy of 21 years. His earnings were not stated in the opinion.

Sunray Oil Corp. v. Allbritton (C.C.A. 5), 187 F. (2d) 475 ($125,000.00). In this case no age was given but the plaintiff had earnings of around $400 a month. His injuries were more severe than Luehr's as shown by the footnote in 88 F. Supp., page 60.

From the above, it is apparent that counsel has indiscriminately cited cases where large figures are mentioned. They have no bearing on the case at bar, other than perhaps to show how frequently Courts of Appeal have found it necessary to reduce jury awards.

The court will note the impropriety of the references made by Luehr's counsel to matters outside the record. Objection to their consideration is hereby made. They are obviously improper and no further comment is deemed necessary.

CONCLUSION.

It is respectfully submitted:

(1) That the award to appellee Luehr must be reduced by reason of his contributory negligence.

(2) That the award is grossly excessive in light of appellee Luehr's average earnings and his working expectancy.

(3) That the amounts paid by way of compensation and medical expenses must be credited to any award to Luehr; and

(4) That the United States is entitled to full indemnity from Jones Stevedoring Company with respect to any award made in favor of appellee Luehr.

Dated, San Francisco, California,
May 29, 1953.

LLOYD H. BURKE,
United States Attorney,
KEITH R. FERGUSON,
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No. 13564

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

RICHARD W. DOUGLAS, *Appellee*

On Appeal from the United States District Court for the Eastern District of Washington

BRIEF FOR THE UNITED STATES, APPELLANT

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BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion. A letter written before trial appears at R. 8-10. Other remarks relevant to the question presented by this appeal are found at R. 169-171, 291, 297, 400-402 and in that portion of the district court's charge found at R. 502-503.

JURISDICTION

The jurisdiction of the district court was invoked under the Acts of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 251, and August 1, 1946, 60 Stat. 745, 42 U.S.C. sec. 1801 *et seq.* (R. 3-4). Its judgment was entered June 28, 1952 (R. 24-27). Notice of appeal was filed August

25, 1952 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATUTE INVOLVED

The material provisions of the Columbia Basin Project Act, approved March 10, 1943, as amended, 16 U.S.C. sec. 835 *et seq.,* are set out in the Appendix, pp. 13-16, *infra.*

At this point, they are summarized as follows:

Under (a) of Section 2, it was provided that before funds could be expended for construction of any of the irrigation features of the project, all lands within it were to be impartially appraised by the Secretary of the Interior "without reference to or increment on account of the construction of the project." At the request of the owner, the Secretary was required to make reappraisals which had to take into account expenditures made by the owner after the preceding appraisal, and other proper elements of value "other than increments on account of the construction of the project" (pp. 13-14, *infra*).

By (b) of Section 2, a landowner could not receive water for more than a nominal quarter section. And "as a condition precedent to receiving water from the project and in consideration thereof," he was required to execute a contract providing, first, that he would dispose of his excess land at the appraised value; second, that from the date of that contract to a date five years after water was delivered he would not sell the land which he could keep at more than the appraised value and would undertake in the event of its sale that an affidavit stating the consideration would be filed for

recording within 30 days and, third, that if the affidavit was not filed or the sale was made for a consideration in excess of the appraised value the Secretary could cancel the water right (pp. 14-15, *infra*).

Section 3, first, punished fraudulent misrepresentation in the affidavit by fine or imprisonment or both; second, made a transaction for a consideration in excess of the appraised value unenforceable as to that part of the consideration and, third, gave the purchaser, if within two years of the transaction he filed a correct affidavit, the right to recover the excess payment together with court costs and attorneys' fees (pp. 15-16, *infra*).

QUESTION PRESENTED

Whether just compensation for arid land condemned by the United States for the use of the Atomic Energy Commission can exceed the price for which it could have been sold at the time of the taking, this price having been previously put upon the land by the Secretary of the Interior pursuant to the direction of the Columbia Basin Project Act to appraise the land (in its arid state) impartially "without reference to or increment on account of the construction" under that Act of a project which would have brought water to the land at a later date.

STATEMENT

From June, 1912, to October, 1913, appellee, Richard W. Douglas, lived with his wife on the land here condemned (R. 126). It is a nominal quarter-section of 162.87 acres (R. 128) in Grant County, Washington (R. 26). Mr. and Mrs. Douglas went on the land in

the hope of farming it (R. 495); while they grew nothing they stayed long enough to qualify for a homestead patent; they moved because the land had no water (R. 496). In 1913 or 1914, Mrs. Douglas received the patent (R. 37). Since they left, the land has been unused (R. 126, 246). It is part of a vast area—at present inaccessible and uninhabited (R. 236-237, 464)—known as the Wahluke Slope.

Following approval on March 10, 1943, of the Columbia Basin Project Act, 57 Stat. 14 (pp. 13-16, *infra*), the East Columbia Basin Irrigation District was incorporated under the laws of Washington. On October 9, 1945, the District and the United States entered into the repayment contract (R. 67-126) required by section 2(a) of the Act (pp. 13-14, *infra*). The land of Mr. and Mrs. Douglas was in the District, and, pursuant to section 2(a) of the Act, was appraised at $1,353.01, about $8.00 an acre (see R. 42). On April 3, 1946, as a condition precedent to the delivery of water to the land, they made with the United States the contract (R. 40-42) required by section 2(b) (pp. 14-15, *infra*). This contract incorporated by reference Articles 5 through 17 of the contract made by the United States on October 16, 1945, with Norman P. and Edith R. Lawson (R. 45-64). Thus, appellee and his wife agreed (Article 10 of the Lawson contract, R. 60); that "in the period from [April 3, 1946] and to a date five (5) years from the time that * * * water is available [they] shall make no conveyance of or contract to convey a freehold estate in the subject lands * * * for a consideration exceeding their appraised value." The project is not in operation and water could not have been delivered until

1954 (R. 275). Mr. and Mrs. Douglas therefore could not have sold the land before 1959 for more than $1,353.01. Mrs. Douglas is now dead (R. 38) and appellee is her sole heir (R. 127).

On March 15, 1951, the Attorney General at the request of the Atomic Energy Commission filed a petition to condemn something over 650 acres including the Douglas tract (R. 3-6). At the same time pursuant to the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a-e) he filed a declaration of taking and for this tract deposited estimated just compensation of $1,385, slightly more than the appraised price (R. 6-8).

The case came on for trial on May 20, 1952. The Government called appellee who testified that he entered into the contract of April 3, 1946 (R. 38-39). That contract and as well the Lawson contract and the repayment contract were admitted in evidence. The Government then moved for a directed verdict in an amount not to exceed the amount provided for in the contract of April 3, 1946 (R. 128-129). The motion was denied (R. 129).

The case was tried on the trial judge's theory that the contractual limitation upon the price at which appellee could sell was to be disregarded and that just compensation was to be *whatever* amount appellee could have obtained for the land as increased in value by the future right to receive water from one who would be bound by the appraised price during the period stipulated in the contract (R. 8-10, 169-171, 291, 297, 400-402, 502-503).

Seemingly, the judge was led to this theory by his view "that it would be unfair to the landowner to make

him take the appraised value, because he isn't required to sell his retained acreage, and he would be free to sell it five years after the water is brought to the land" (R. 170) and that "Mr. Douglas * * * has a value there that should be considered * * * over and above the appraised value put upon it by the Reclamation Bureau as raw land" (R. 297).

In obedience to this theory Government witnesses valued the land—at the most—at about $25 an acre (R. 311, 403, 437), the witnesses for the landowner valued it at from $80 to $100 an acre (R. 369, 468, 490). The jury returned a verdict of $9,365.03 or about $57.50 an acre (R. 24) upon which judgment was entered (R. 24-27). This appeal followed (R. 27).

SPECIFICATIONS OF ERROR

The statement of points relied on by the United States on its appeal (R. 511-512) may be summarized as follows:

The district court erred

1. In denying the Government's motion for a directed verdict in an amount not to exceed the amount provided for in the contract between appellee and the United States, Exhibit No. 6 (R. 129);

2. In instructing the jury (R. 502-503) that:

> You are to value the land with its irrigation potentialities as they existed at the time of taking under the contracts just mentioned. In other words, you are to value this land with the contract water rights to which it was entitled under the contract, bearing in mind that the water was to be

brought to the land in the future under the terms and conditions of the contracts.

In determining market value on the basis of this theoretical buyer and this theoretical seller, you should assume that the sale was to be made of the land together with the contract water right under the contracts pertaining to the land, with all the advantages and disadvantages that go with them. You should assume, however, that the seller would be free to sell for whatever price he could obtain from the theoretical or imaginary buyer, without being limited or bound by the appraised value placed upon the land by the Reclamation Bureau. The theoretical buyer, however, would as of the date of taking, so far as the contracts are concerned, step into the shoes of Mr. Douglas and would be entitled to all the benefits and subject to all the burdens and disadvantages of the contracts. The buyer could not, of course, resell for more than the Reclamation Bureau appraised value within five years after the water for irrigation became available to the land.

3. In entering judgment on the verdict.

ARGUMENT

Just Compensation for the Land Taken May Not Exceed the Appraised Value Stipulated in the Contract

Section 2(a) of the Act required an impartial appraisal of all lands within a project "without reference to or increment on account of the construction of the project." It entitled the owner to reappraisals taking into account all proper elements of value "other than

increments on account of the construction of the project." Appellee's land was appraised at $1,353.01. He has not contended that the appraisal was too low. And the fact that he did not seek a reappraisal, indicates his satisfaction with the original appraisal. Thus $1,353.01 is the fair value of the condemned land "without * * * increment on account of the construction of the project."

Section 2(b) required appellee "as a condition precedent to receiving water from the project" to execute a contract that he would not sell his land for more than the appraised value until five years after water was delivered. Appellee made the required contract.

In addition to other penalties for a sale in violation of the contract, section 3 of the Act gave a purchaser of appraised land a cause of action for the recovery of payments made in excess of the appraised value *together with costs and reasonable attorneys' fees.* In the face of this provision, no owner of land would take the risk of trying to obtain more than the appraised value. For, however desirous he might be of receiving a greater amount, he could not have counted on the good faith of the purchaser. It would be too easy for the latter at little or no expense to himself to recover the excess while retaining the land. Thus appellee could not have sold his land for more than $1,353.01. That amount, therefore, was market value. A market value fixed by law is no less a measure of just compensation than one fixed by voluntary transactions between buyers and sellers. *Highland* v. *Russell Car Co.,* 279 U. S. 253, 262 (1929); *United States* v. *Commodities Corp.,* 339 U. S. 121, 130 (1950); *Cudahy Bros Co.* v.

United States, 155 F. 2d 905 (C.A. 7, 1946); *Louisville Flying Service* v. *United States,* 64 F. Supp. 938, 942 (W. D. Ky. 1945); *Graves* v. *United States,* 62 F. Supp. 231 (W. D. N. Y., 1945). Cf. *United States* v. *Delano Park Homes,* 146 F. 2d 473, 474 (C.A. 2, 1944). An award for a greater amount would give appellee more than the land was worth.

Nonetheless, as is shown in the Statement (pp. 5-6), the trial judge was of opinion that an award of the appraised value would be "unfair to the landowner" because he thought the land had a value "over and above the appraised value put upon it * * * as raw land." He ascribed this additional value to the fact that, since appellee's contract with the Government did not compel him to dispose of this nominal quarter section, he could hold it until expiration of the five-year period and to the further fact that the contract provided for delivery of water. Neither of these facts has any bearing upon the question of value.

The circumstance that appellee had the right under the contract to retain the land and the consequent prospect of selling it at some future date for more than its appraised value did not enhance its value at the time of the taking. As the Supreme Court has held, this so-called "retention value" is not an element of just compensation. *United States* v. *Commodities Corp.,* 339 U. S. 121, 126-129 (1950).[1]

Equally irrelevant in the determination of value is the fact that at the time of taking appellee had a con-

---

[1] As the dissenting opinions show (see 339 U. S. at pp. 135-136 and 141) the holding of the Court was unanimous in this respect.

tract entitling him in the future to water from the project. Congress expressly prevented appellee from acquiring by that contract any rights which he could convert into money upon a sale of the land. Thus, the Columbia Basin Project Act required appraisal of the land as raw land, i.e., "without reference to or increment on account of the construction of the project," and prevented a sale for more than the price fixed by this method of appraisal. Therefore the contract did not confer rights which enhanced the value of the land. It follows that, contrary to the view of the trial judge, the land did not have a value "over and above" the appraised value.[2]

From whichever aspect the matter is viewed the value

---

[2] The trial judge was also influenced by a thought expressed as follows (R. 297): "Suppose that Mr. Douglas' situation under these contracts was that he could never resell this land for more than a dollar an acre, but he and his heirs could keep it and use it. Is he to be deprived [by condemnation] of the valuable right of use, his life expectancy and his heirs after him, * * * simply because if he sold it he could only get a dollar an acre?"

This is not a *reductio ad absurdem* of the Government's position because it is based upon the assumption that Congress would enact a statute entirely unlike the Columbia Basin Project Act. Thus the judge assumes that Congress—why none can imagine—would require that arid land should be arbitrarily priced at less (perhaps much less) than its value and that (even after the addition of water) would *forever* forbid the owner to sell for more than this arbitrary price.

On the contrary, the Columbia Basin Project Act required that arid land be "appraised" and forbade its resale at more than the appraised value for only five years after delivery of water—and not perpetually. The five-year limitation is quite reasonable. As a Government witness testified (R. 276): "It would take that five-year period to properly develop the land and get it into production."

appraised value. Either the land is to be considered of the land at the time of the taking cannot exceed the without a contract right to receive water in the future (in which case the appraised value—the fairness of which is not in question—is as much as appellee could have sold it for) or it is to be considered as having the contract right to water (in which case the same contract limits its selling price to the appraised value). Accordingly it is plain that the trial court erred in denying the Government's motion for a directed verdict in an amount not to exceed the appraised value.

It is also plain that the trial court erred in instructing the jury to award appellee whatever amount they believed he could have obtained for the land with its contract right from a vendee who could not sell for more than the appraised value. For, when regard is had to the fact that appellee could not sell for more than the appraised value, it is obvious that a jury may not speculate as to what he could have received if he had been free of the prohibition and that in permitting them to do so the instruction was erroneous.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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John F. Cotter,
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March, 1953

APPENDIX

So far as material, the Columbia Basin Project Act, approved March 10, 1943, 57 Stat. 14, as amended, 16 U.S.C. sec. 835 *et seq.*, enacted to prevent "speculation in lands of the Columbia Basin Project," provides:

> Sec. 2(a) No part of the funds * * * appropriated or allotted for [Columbia Basin] project construction or for the reclamation of land within the project shall be expended in the construction of any irrigation features of the project, * * * until the requirements of the following subdivisions (i) and (ii) of this subsection (a) have been met:
>
> (i) All lands within the project shall have been impartially appraised by the Secretary of the Interior * * * and evaluated at the date of appraisal without reference to or increment on account of the construction of the project. Reappraisals may be made at any time by the Secretary, and will be made upon the request of the landowner * * *. In such reappraisals the Secretary shall take into account, in addition to the value found in the first appraisal, improvements made after said appraisal, such irrigation construction charges on the land as have been paid, and other items of value that are proper, other than increments on account of construction of the project. * * *
>
> (ii) Contracts shall have been made with irrigation, reclamation, or conservancy districts organized under State law embracing the lands within the project providing for payment thereby of that part of the cost of construction of the project de-

termined by the Secretary to be the part thereof to be repaid by irrigation. * * *

(b) (i) The lands within the project shall be developed in irrigation blocks, * * *. The Secretary shall segregate the lands in each irrigation block into farm units * * *. No farm unit shall contain more than one hundred and sixty or less than ten acres of irrigable land, except that any nominal quarter section comprising more than one hundred and sixty acres of irrigable land may be included in one farm unit, * * *.

* * * * * *

(iii) Water shall not be delivered * * * to * * * lands not conforming * * * to the farm units covering the lands involved * * *.

(iv) Lands within the project in excess of one farm unit held by any one landowner shall * * * be deemed excess land: * * *.

* * * * * *

(v) * * * (c) As a condition precedent to receiving water from the project and in consideration thereof, each landowner shall be required to execute, within six months from the date of the execution of the contract between the United States and the district within which the land is located, a recordable contract covering all his lands within that district, * * *.

Each such recordable contract shall provide—

(i) That the landowner will conform his lands * * * to the area and boundaries of the pertinent

farm unit or units shown on the plats filed under subsection 2(b) and will dispose of excess land * * * at its appraised value; that the Secretary is thereby given an irrevocable power of attorney to sell in behalf of the landowner any such excess land at said appraised value; and that the United States is thereby given * * * an option to buy any such excess land at said appraised value; * * *.

(ii) That in the period from the date of execution thereof and to a date five years from the time water becomes available for the lands covered thereby, no conveyance of or contract to convey a freehold estate in such lands, whether excess or nonexcess lands, shall be made for a consideration exceeding its appraised value, and * * * the grantor or vendor or the grantee or vendee or any lien holder thereof shall, within thirty days from the date of such conveyance or contract, file in the office of the county auditor in the county or counties in which the land is located an affidavit describing * * * the consideration therefor.

(iii) That in the event that within such period such a conveyance of, or contract to convey, is made without filing within said thirty days the affidavit required * * * or is made for a consideration in excess of the appraised value, the Secretary, * * * may cancel the right of such estate to receive water * * *.

* * * * * *

Sec. 3(a) Fraudulent misrepresentation as to the true consideration involved in the conveyance

of, or contract to convey, any freehold estate in land covered by a recordable contract * * * in the affidavit * * * shall constitute a misdemeanor punishable by a fine not exceeding $500 or by imprisonment not exceeding six months, or by both * * *.

(b) Should any freehold estate in lands subject to the recordable contract * * * be conveyed or contracted to be conveyed, after the date of execution of such recordable contract and within five years from the time water becomes available for such lands, at a consideration in excess of the appraised value of said estate, the transaction * * * shall be invalid and unenforceable by the vendor or grantor, * * * as to that part of the consideration in excess of the appraised value * * *. * * *

The vendee or grantee * * * at any time within two years from the date of any such conveyance or contract and on filing a correct affidavit * * * may recover * * * an amount equal to the payments made in excess of the appraised value.

In connection with any judgment or decree hereunder in favor of a vendee or grantee, said vendee or grantee shall have the right to recover court costs and reasonable attorneys' fees.

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v.

RICHARD W. DOUGLAS, *Appellee*

On Appeal from the United States District Court for the Eastern District of Washington

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BRIEF FOR RICHARD W. DOUGLAS, APPELLEE

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SUPPLEMENT TO STATEMENT

The statement of governing facts included in the Appellant's Brief requires some slight correction and amplification.

On Page 4 of Appellant's Brief counsel says that the land in question is "part of a vast area — at present inaccessible and uninhabited." The record shows that there are roads to the land and beside it (R. p. 172). Counsel will not dispute that the only reason the land is inaccessible is because the land is now part of the area to which access is denied by Government regulation, presumably for supposed reasons of safety since the land is in the general neighborhood of the great plutonium plant at Hanford.

It certainly was not inaccessible until put into a zone where travel is prohibited.

On the same Page 4, Appellant says that "The project is not in operation—." Very evidently this brief was written by a counsel in Washington, D. C., who is not informed of the progress on the Columbia Basin project. It is believed that the court will take judicial notice of the fact that the project is already in operation on some of the more northerly lands in the area. The Columbia Basin irrigation project is already a going concern.

The statement offered by Appellant does not make entirely clear the fact that Mr. Douglas and his wife owned this land for a long time prior to 1937. By special provision of law (Columbia Basin Project Act, Sec. 835a (b) (I, III and IV) in U. S. C. A., Vol. 16, pocket part, pages 242-243), the owners who held title prior to 1937 are not restricted to a mere "subsistence farmstead" of 40 acres. If they owned as much as a quarter section, or a so-called "nominal" quarter section which has acreage slightly over 160 acres, such owners are permitted to retain all of it and no part of such holding is to be regarded as excess land. The term excess land is here used in the sense of the Reclamation Act and the contracts made by the Government with the three districts into which the Columbia Basin project was divided; that is, land which the settler is not entitled to keep but which may be sold by the Secretary of Interior for the Department of Interior under that power-of-attorney given in the "recordable contract."

The point of all this is that Mr. Douglas had no excess land, and he could not be compelled to part with any of his property under the recordable contract.

ARGUMENT

The gist of the Appellant's Brief is an argument that the price to be received for Mr. Douglas' land should be fixed by the appraisement figure of about $8 per acre, placed upon the land years ago when the Columbia Basin project was started.

The gist of our argument in resistance to this claim is that as between the Government and Mr. Douglas the old appraisement became of no force whatsoever for two independent reasons. Either of these would prevent control by the old appraisement. These reasons are:

1. The appraisement made under the provisions of the "recordable contract" had force only so long as the contract was in effect. But the contract was abrogated by the taking. The United States is no longer under a duty to supply water to the land in question, and Mr. Douglas likewise is released from the terms of that contract.

2. The subject matter of the taking here was not the land alone, but the contract rights as well. The *res* appropriated by the Government was title to the land plus all the contract rights which Mr. Douglas had enjoyed up to the moment of the taking. The old appraisement applied to the land alone.

These contentions are amplified in the following paragraphs.

It is essential in studying this case to have clearly in mind that there was a contractual relation between Mr. Douglas, the Appellee, and the United States. The contract provisions are set forth at length in the formally executed agreement between the United States and the South Columbia Basin Irrigation District, which appears in the Record at pages 67 to 126 inclusive. It was executed on October 9, 1945, and signed on behalf of the Government by Harold L. Ickes, Secretary of the Interior, and on the part of South Columbia Basin Irrigation District by the President of its Board of Directors. By this undertaking the Government committed itself to deliver water to the lands of a very large number of landowners in the district, provided that they lived up to the conditions fixed for them in the contract. First of these was that they should enter into individual contracts in the form designated as the "recordable contract," binding themselves to accept an appraisement on the land (to be made promptly) and thereafter not to sell the land for any sum greater than the value fixed by such appraisement, throughout a period which would end five years after water was delivered on the land. Conforming with the Columbia Basin Project Act and with this master contract between the Government and the South Columbia Basin Irrigation District, these recordable contracts further provided that a power-of-attorney was created and given to the Secretary of the Interior, whereby he might sell any excess land held by the indi-

vidual landowner, either to the Government or to third parties, at the rate fixed by the appraisement.

Excess lands were such as any individual might own beyond the acreage he was allowed to keep under the terms of the act. For most settlers the permanent holding was a "subsistence homestead" of 40 acres. But for those who held their titles at or prior to the year 1937, a full quarter section or a "nominal quarter section," consisting of 160 acres plus the few acres in addition to that number occurring through familiar adjustments in the Government surveys, might be held by such individuals free from operation of the power of attorney. Mr. Douglas was in this class; his title goes back much further than 1937.

Without elaborating the obvious, it is clear that the master contract made by the Government with the South Columbia Irrigation Distict was a contract for the benefit of third persons; these persons were the individual settlers. They ratified and adopted such master contract, and conformed to its terms in entering into the individual contracts which are conveniently designated as the "recordable contracts."

Mr. Douglas had therefore made a bargain with the Government. His part of the agreement was that he would comply with the terms of his recordable contract (set forth in the Record at Pages 40 to 42 inclusive). The Government on its part agreed to complete the various engineering works necessary and to deliver water to Mr. Douglas' land. There was a contingency recognized which might have defeated

this contract, in that Congress might have abandoned the project or failed to make the great appropriations necessary to carry it through. Those contingencies however are of the past. The court will take judicial notice of the fact that the Grand Coulee Dam has been built, also the equalizing reservoir, and canals which are already diverting water of the Columbia River down to the thirsty acres of the sage-brush country. It was proved and not disputed that the controlled water would have reached Mr. Douglas' land about 1954.

It is thus seen that the appellee had contract rights which had become very valuable to him by the time of the taking in March, 1951, and these were entitled to the protection of law. He had never violated his side of the contract nor done anything to forfeit it. Yet the contract is at an end. It is completely abrogated, through the power of eminent domain. The Government has done what a private individual could not do; it has destroyed the contract completely, its own obligations and Mr. Douglas' obligations. It is not a breach of contract for the sovereign thus to appropriate contract rights; the power of eminent domain makes such a course legally possible. And it should follow as a simple and clear result that when the contract is ended as to one party it is likewise ended as to the other party. It is unconscionable for the Government to assert that although it is no longer bound to deliver water to this particular land which has been condemned because its contract to do so has been ended by the taking, Mr. Douglas

should still be bound by that contract and should still be under the compulsion of the old appraisement. As to this argument, that the landowner is still bound by the appraised price, it would be just as sensible for us to claim that the United States is still bound to deliver water to the edge of this tract. This is an absurdity; it is no less absurd to claim that Mr. Douglas is bound by his contract when the Government is released through its act in taking and in effect destroying his contract by the power of eminent domain.

This land never will be irrigated. It has been seized and dedicated to the interests of the Atomic Energy Commission. There is no point any longer in considering the provisions of the Anti-Speculation Law, pursuant to which these appraisements were made. As to this land, the Columbia Basin project is a thing of the past. It is of importance here only to the extent by which the great works and the near approach of the water had already affected the intrinsic value of the land at the time of the taking on March 15, 1951. It will hardly be disputed that value over and above that of raw land had been built up, as the project approached fruition and the water neared the land. The great Coulee Dam, the equalizing reservoir and the canals were not built solely for the benefit of the northerly acres now under water. These tremendous improvements have shed value month by month and year by year, as they progressed, over every acre to which water was promised. It is this accumulated value which the United States seeks now to take from Appellee, by insisting

on the original appraisement figure based on the value of this tract as raw grazing land when it was valued ten or twelve years ago.

While the project was new and in its earliest stages, some owners doubtless have seen fit to part with their land for the appraisal figures. They might have been impelled by necessity or desire for a change. But it is obvious that as the water came near no owner would want to sell his land for the appraised value which bound him. After holding so long he would be eager to enjoy or realize upon the added value which irrigation could give to this exceedingly fertile land. This is the reason why landowners have been unwilling to sell, as shown in the testimony of Mr. Donaldson (Record p. 364) and Mr. Miller (Record p. 486). The nearest approach to an open market was seen in those auctions of school land conducted by the State of Washington, which is not bound by the recordable contracts. These auctions were held less than a year before the trial and indicated values as high or better than the figure adopted by the jury.

We turn now to the second reason why the Government's position is untenable. What was taken here was not only land; Mr. Douglas' contract with the United States was taken at the same time. The *res* which is the subject-matter of condemnation is land-plus-contract. It is neither just nor permissible to look at the land alone and say that nothing else was taken. Even if it should be thought that the land might still be had lawfully without paying more than the appraised price, the court we think would be will-

ing to regard that other property right of Mr. Douglas' which has been seized, namely the contract, and realize that no appraised value has been set on it. The contract right is property too, and the appraisement set on the land a dozen years ago could not advise the court what the contract right would be worth in 1951. The appraisal, then, goes only to a part of the *res* taken. There is no set price on the value of the contract. And a contract is just as much property as land is.

There is ample authority on this point.

In a southern case a county had bought a right of way to obtain a bridge site; there was a provision in its contract that its bridge must be built high enough to make clearance for a dam intended to be built by the owner. But the county changed its plan and condemned the same ground as a bridge site, thereby abrogating its earlier promise to make clearance for the dam. The court held that the contract was an integral part of the *res,* and compensation was ordered to be assessed on the value of the land taken as enhanced by the value of the contract.

> "But the right acquired by the Complainant—assuming the binding obligation of the stipulations of the grant—must have protection. If that contract has contributed to the value of the site which the county proposes to condemn, such increment of value will be taken into consideration in extending the just compensation to be paid for the site." *Brown vs. Jefferson County,* 211 Ala. 517—101 Southern Reporter 46.

In *Brooks-Scanlon Co. vs. U. S.,* 265 U. S. 106—68 Lawyer's Edition 934, the facts were that the Gov-

ernment commandeered a partly-built ship in war time and along with the ship took the benefit of the contract under which it was being constructed. Compensation offered the owner was based only on the value of the unfinished ship; but the original owner showed to the satisfaction of the Supreme Court that the contract itself was of great value to him as well as the physical assets appropriated. The question was whether the physical property alone was the *res* for which payment must be made or whether it was the ship plus the contract. The Supreme Court held that recovery must be allowed for more than the tangible property, and that the contract loss must be compensated also. Heart of the opinion is found in these words:

> "The award was erroneous because of the failure to find the value of the contract rights taken."

Dealing with this same concept of land-plus-contract, as being the *res* taken under eminent domain, we note the Supreme Court case cited below. The Government, acting under directions of an act of Congress, undertook to condemn a "Lock and Dam No. 7" on the Monongahela River, this property being owned by appellant. A circumstance which brings our point into sharp relief is that the act of Congress specified that there should be condemnation of the lock and dam, but that nothing should be paid for the franchise of the corporation under which it collected tolls from the public, for use of its facilities at the lock and dam. In other words, the Congress was assuming to instruct the Government officers to condemn

the physical property, but to pay nothing for contract rights. This rather disingenuous idea was smashed flat by the Supreme Court, which said first of all in the opinion that Congress had no power to prescribe what the compensation should be, that the measure of compensation was a judicial question, and that the taking of the contract or franchise was taking the property of the owners just as much as taking masonry and steel that made up the improvements.

> "The bridge structure, the stone, iron, and wood, was but a portion of the property owned by the bridge company, and taken by the government. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of the franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness."

Quoting further from the latter part of the opinion, we find this:

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment not merely of the value of the tangible property itself but also of that of the franchise of which he is deprived."

Monongahela Navigation Co. v. U. S., 148 U. S. 311—37 L. Ed. 463.

In offering his criticisms of the trial judge's comment (in absence of the jury) that the property of Mr. Douglas had acquired a value above the appraisement, it seems to us that opposing counsel rather misses the judge's point. The court was comparing the "farmstead" land with "excess" land; as to the latter every owner has given the Secretary of the Interior a power to sell, in the owner's name, for the appraised figure. Therefore the owner of excess land cannot claim to have any indefeasible contract right to have his extra land irrigated. In effect he kissed his excess land good-bye when he signed the "recordable contract." He cannot ask a greater price than the appraisement, even on a condemnation. But it is quite otherwise with the owner of a farm unit or "farmstead." His own land he is entitled to have improved, through completion of his irrigation contract. This is the distinction the court was making.

But "retention value" has been condemned by the Supreme Court, says counsel. Let us observe what the Supreme Court was talking about in the cited case (*U. S. v. Commodities Corp.,* 339 U. S. 121, 94 L. Ed. 713). Value being fixed there was that of black pepper, a highly speculative item, which had been requisitioned by the Government in war time. The owner was not a trader, he was an "investor," i. e., a speculator, and the retention value he claimed was based on the expectation of future profits, to be realized in later years through fluctuation of the market. Speculative future profits—that was what

he wanted, describing his wish with the words "retention value." What the court held was a refusal to allow future profits, either by that name or under the specious title of "retention value."

But there is no element of future profits to be seen in appellee's award. He was not asking for any increment of value, to be added to this land in the future. He asked and received only the jury's estimate of that value which had been accumulated under his contract up to the moment of taking. He asked only that the situation be viewed as it had crystallized on March 15, 1951. Recognizing that the contract had been abrogated, he was not demanding any compensation for future values that would have been created by further progress in irrigation development. He asked, and got, only the value which had been accumulated up to the moment of taking. His position is entirely different from that of the speculator in black pepper, who wanted to hold his goods —to assert a "retention value"—in the hope of values to be created in the future.

In passing we might note that the Supreme Court said in the cited case that a so-called retention value might be allowable under some conditions. We quote:

> "And exceptional circumstances can be conceived which would justify resort to evidential forecasts of potential future values in order to determine present market value."

This from page 126 in the official report. An inviting argument might be offered to show that this would be such an exceptional case. But it is believed that we do not need to invoke the exception. We feel

that we have shown that the valuation awarded here had no aspect of the speculative "retention value" condemned by the Supreme Court.

We should not close this discussion without a brief notice of the authority relied on by opposing counsel, concerning the effect of ceiling prices. It is true that in many cases the courts have recognized that the ceilings affected market value and were therefore allowed to control. But let it be remembered that in all such cases as those cited in the opposing brief the ceilings were obligatory on everybody by direct force of law. Here the appraised value which counsel wants to treat as a ceiling was not fixed by law, but was a matter of contract between appellee and the Government. We have already shown that such restriction perished along with the contract which set it up. Furthermore it is to be remembered that all the cases cited were concerned with the taking of a physical *res* only and were not complicated by the simultaneous taking of intangible property in the form of a contract right. Such a right has been destroyed in the case at bar, and it has no "ceiling price." There was no artificial restriction set to govern the value of this bargain with Uncle Sam.

We believe these arguments are persuasive for affirmance, and submit them accordingly.

Respectfully,

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In the United States Court of Appeals for the Ninth Circuit

No. 13564

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REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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ARGUMENT

JUST COMPENSATION FOR THE LAND TAKEN MAY NOT EXCEED THE APPRAISED VALUE STIPULATED IN THE CONTRACT

In its earlier brief, the Government said (p. 8): "Appellee's land was appraised at $1,353.01. He has not contended that the appraisal was too low. And the fact that he did not seek a reappraisal indicates his satisfaction with the original appraisal. Thus $1,353.01 is the fair value of the condemned land 'without * * * increment on account of the construction of the project.'" Appellee does not take issue with this statement of fact. Then, after a summarization of the pertinent provisions of the Columbia Basin Project Act, the Government pointed out (p. 8) that "appellee could not have sold his land for more than $1,353.01.

That amount, therefore, was market value." Again appellee does not contend otherwise. Accordingly, the Government submits: Since the value of the raw land did not exceed its appraised price and it could not have been sold for a greater sum, just compensation cannot exceed that amount and consequently an award for more than seven times that sum ($9,365.03) is manifestly erroneous. Nonetheless appellee seeks to sustain the judgment upon that award.

At the outset—before dealing with appellee's brief—the Government requests the Court to have the following in mind: Without water, the land was worth no more than the appraised value. Its value could be increased only if it received water. But, except for the contract with the Government, there was neither hope nor expectation of receiving water. Therefore, in seeking to sustain a judgment for more than the appraised price, appellee—despite his numberless disavowals—necessarily relies upon the contract. Tested by the foregoing observations, appellee's arguments crumble.

Thus, he first says (Br. 3-8) that since the Government is no longer bound to deliver water to the land, he is no longer prohibited from selling the land for more than the appraised price. As he puts it (Br. 7): "* * * it would be just as sensible for [appellee] to claim that the United States is still bound to deliver water to the edge of this tract. This is an absurdity; it is no less absurd to claim that Mr. Douglas is bound by his contract when the Government is released through its act in taking and in effect destroying his contract by the power of eminent domain."

But if it is absurd "to claim that the United States is still bound to deliver water to the edge of this tract"—and with this the Government agrees—how then can the value of the tract be enhanced by the prospect that the United States would deliver that water? And how then can the award of the trial court be sustained since it was based on the notion (p. 5 of U.S. brief) that the value of the land was to be determined by taking into account its right to receive water *under the contract?* It is evident, therefore, that the court fell into the absurdity pointed out by appellee.

Appellee also argues (Br. 3, 8-14) that the Government took not only his land but also his contract with the Government, that the appraised price only covered the land alone and that just compensation required payment also of the value of the contract which, appellee says, has not been appraised. This argument is dissipated by the recollection that the contract has no value apart from the land, because the right to receive water conferred by the contract could not have been assigned to any other land. Consequently, the only question is whether existence of the contract enhanced the value of the land beyond the appraised price (see e.g., *Brown* v. *Jefferson County,* 211 Ala. 517, 518, 101 So. 46 (1924) and since it prohibited sale of the land at more than appraised value, obviously it had no such effect.[1]

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[1] The argument that the contract was condemned with the land is inconsistent with the one premised on the conception that the contract was abrogated or destroyed. Though neither conception helps appellee, it may be noted he was right the first time. Of course, the Government did not have to become successor to appellee's rights to receive water from itself. Rather with the taking of the land, there was nothing left for the contract to operate on, and it ceased to exist. See e.g., *Brooks-Scanlon Corp.* v. *United States,* 265 U.S. 106, 120-121 (1924).

Despite appellee's assertion to the contrary (Br. 12-13) the instant case is indistinguishable from *United States* v. *Commodities Corp.*, 339 U.S. 121, 126-129 (1950). In each the governing facts were as follows: At the time of the taking the owner was not obliged to sell the thing condemned. However, at that time there was a ceiling upon the price at which it could be sold. There was every reason to believe that in the future this limitation would be removed and that the *res* then could be sold for a much greater amount. Yet the Supreme Court held that these circumstances were not to be taken into account in fixing just compensation. Similarly they should not have been considered in fixing just compensation in the case at bar.

Appellee is not helped by his assertion (Br. p. 13; see also Br. 7-8) that the award gave him only "that value which had been accumulated under his contract up to the moment of taking" and no "compensation for future values that would have been created by further progress in irrigation development." Certainly appellee was not entitled to be compensated for what he calls "future value"; it goes without saying that, even without regard to the Columbia Basin Project Act and the contract, appellant could not have recovered in 1951, when the land was taken, the price for which it could have been sold in 1959 after expiration of the restriction on resale price. It is equally certain—because of the provisions of the Act and the contract—that appellee could not receive in 1951 any part of the enhancement which would occur in 1959. There is no warrant for his notion that the land had a creeping value, i.e., that the value increased year by year as the interval between the signing of the contract and the date ending the restric-

tion on resale price shortened. Congress could have so provided. Instead, though permitting reappraisals at any time, it provided that such reappraisals should not take into account "increments [of value] on account of construction of the project" sec. 2(a)(i) (Appendix to U.S. Brief p. 13). It follows that at the time of the taking his land had not accumulated any value under the contract.

CONCLUSION

From whichever aspect the matter is viewed the value of the land at the time of taking could not exceed the appraised value. Either the land is to be considered without a contract right to receive water (in which case the appraised value is the market value) or it is to be considered with the contract right to water (in which case the contract limits its selling price to the appraised value). Accordingly, the award for more than the appraised value is erroneous and the judgment thereon should be reversed.

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